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In The

Supreme Court of the United States

October Term, 1989

MISSOURI DIVISION OF TRANSPORTATION,
ALABAMA PUBLIC SERVICE COMMISSION, et al.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission (ICC) have exclusive primary jurisdiction to preempt state regulation of the motor carrier transportation of bulk commodities by Matlack, Inc. (Matlack), by issuing a declaratory order declaring that Matlack's transportation performed entirely within Missouri is essentially interstate in character and not subject to state regulation?

2. Did the ICC abuse its discretion by issuing its declaratory order in circumstances which effectively removed Matlack's anticipated federal defense to state law violations from a state court to the ICC and federal courts?

3. Did the ICC commit prejudicial procedural error, (a) by failing to provide adequate notice to the State of Missouri, (b) by denying requested discovery, cross-examination, and oral hearing, or (c) by refusing to engage in any factfinding to resolve the material factual disputes?

4. Did the ICC's conclusion that Matlack's single-state motor carrier transportation is essentially interstate in character conflict with applicable decisions of this Court rendered in the context of rail carrier transportation?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals were as follows:

Petitioners: Steere Tank Lines, Inc., Middlewest Motor Freight Bureau, National Motor Freight Traffic Association, Inc., New York Motor Carrier Conference, Central States Motor Freight Bureau, Inc., Eastern-Central Motor Carriers Association, Inc., Central & Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, New England Motor Rate Bureau, Inc., and Southern Motor Carriers Rate Conference.

Intervenors in Support of Petitioners: Alabama Public Service Commission, Groendyke Transport, Inc., Jarvis Leasing, Inc., The Maxwell Co., Missouri Division of Transportation, National Association of Regulatory Utility Commissioners, Petco, Inc., Interstate, Propane Transport, Inc., Texas Department of Public Safety, the State of Texas, Truckway Service, Inc., Ward Transport, Inc., and Weiss Trucking Co., Inc.

Respondents: Interstate Commerce Commission and United States.

Intervenors in Support of Respondents: Matlack, Inc., and National-American Wholesale Grocers Association.

Additional parties of record before the ICC, who did not enter an appearance in the Court of Appeals, include: Overnite Transportation Co., Digital Equipment Corp., General Mills, Ashland Petroleum Co., Chemical Leaman Tank Line, Neal K. Hobbs, Pennsylvania Public Utility

LIST OF PARTIES – Continued

Commission, Private Carrier Conference, Inc., Wayland Little & Associates, Lee E. Lucero, Hugh T. Matthews, William J. Monheim, James W. Patterson, National Classification Committee, U.S. Department of Transportation, Ohio Public Utilities Commission, Charles M. Williams and Regular Common Carrier Conference.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, Missouri Division of Transportation, and Alabama Public Service Commission, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the consolidated cases, docketed as No. 87-2043 and No. 87-2419 in the court below, and entitled *Middlewest Motor Freight Bureau, et al. v. Interstate Commerce Commission and United States,* and *Steere Tank Lines, Inc. v. Interstate Commerce Commission and United States,* respectively.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported, and is reprinted in the Appendix hereto, p. App. 1, *infra*.

The decisions of the Interstate Commerce Commission (ICC) reviewed by the Court of Appeals have not been reported. The original ICC decision in Docket No. MC-C-10999, entitled *Matlack, Inc. – Transportation Within Missouri – Petition For Declaratory Order*, is reprinted in the Appendix at p. App. 10.

JURISDICTION

The putative jurisdiction of the Interstate Commerce Commission was invoked through the filing with the ICC of a petition by Matlack, Inc., seeking a declaratory order under 5 U.S.C. § 554(e) to determine whether Matlack's described transportation of bulk commodities by motor vehicle within the State of Missouri is intrastate or interstate in character. By a decision entered June 17, 1987, the ICC concluded that Matlack's described transportation is performed in interstate commerce. On petitions to reopen its original decision, the ICC entered decision on December 31, 1987, which allowed the Missouri Division of Transportation and State of Texas to intervene but denied the petitions to reopen the proceeding.

Two separate appeals by various intervenors in the ICC proceeding were consolidated for briefing and submission in the United States Court of Appeals for the Eighth Circuit. On February 3, 1989, the Court of Appeals entered a judgment and opinion which affirmed the decision of the ICC. The Joint Petition of Intervenors, Missouri Division of Transportation and Alabama Public Service Commission, For Rehearing En Banc, was denied by and order of the court of Appeals entered April 10, 1989.

This Court has jurisdiction under 28 U.S.C. § 2350(a) to review the final judgment of the Court of Appeals on a writ of certiorari as provided by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS

Due to the length of the provisions involved, pertinent portions of the following constitutional and statutory provisions are reproduced in the Appendix hereto, beginning at p. App. 48:

United States Constitution, Amendment 5.

5 U.S.C. section 554 (1982).

5 U.S.C. section 556 (1982).

5 U.S.C. section 706 (1982).

49 U.S.C. section 10306(c) (1982).

49 U.S.C. section 10328(b) (1982).

49 U.S.C. section 10521 (1982 & Supp. 1987).

Section 390.051, Mo. Rev. Stat. (1978).

Section 390.051, Mo. Rev. Stat. (1986).

STATEMENT OF THE CASE

This case fundamentally involves a dispute over whether certain motor carrier transportation, performed entirely within Missouri by Matlack, Inc. (Matlack), is essentially interstate rather than intrastate in character, and whether the federal or state government is the proper authority to decide that dispute. Matlack is a motor carrier holding interstate operating authority from the ICC. At the time Matlack performed the transportation involved in this case, it had no intrastate operating authority issued under state law by the Missouri Division

of Transportation (MDOT).[1] MDOT is a state administrative agency responsible under state law for regulating motor carriers operating on Missouri's highways.

In June, 1986, Matlack began transporting certain bulk chemicals as a contract carrier by motor vehicle within Missouri, under a contract with Chemtech Industries, Inc. (Chemtech). Chemtech is a manufacturer and distributor of chemicals and related commodities, which owns and operates distribution facilities located within Missouri at St. Louis, Kansas City and Springfield. Matlack began delivering bulk chemicals consigned to it by Chemtech, from Chemtech's Missouri facilities to its customers at various destinations within the state. In transporting these shipments for Chemtech, Matlack's vehicles always remain within Missouri.

Beginning on or about July 10, 1986, Matlack received three Uniform Traffic Tickets from officers of the Missouri State Highway Patrol, charging that Matlack was engaging in transportation as a motor carrier in intrastate commerce, without the required certificate of authority from MDOT, in violation of § 390.051, Mo. Rev. Stat. (1978). These criminal misdemeanor charges were docketed for prosecution in the Circuit Court of Franklin County, Missouri. Before the initial court date on these traffic tickets, Matlack filed a petition with the ICC under 5 U.S.C. § 554(e), entitled "Petition for Declaratory Order Seeking Determination of the Interstate Nature of Transportation Activities Within the State of Missouri".

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[1] Matlack later obtained statewide common and contract carrier authority from MDOT under § 390.051.3, RSMo 1986, but did not possess it during the period involved here. A state administrative complaint is pending against Matlack before MDOT, asserting that the transportation in issue here violated state law. *MDOT Staff v. Matlack, Inc.*, Case No. TC-488-88, MDOT's administrative law judge has stayed proceedings on a motion to dismiss filed by Matlack, pending the outcome of this case.

In its petition Matlack stated that it had received "citations from Missouri officials", and admitted that it "could await 'trial' dates on these citations and pursue its argument that the involved transportation is interstate in nature." Instead, Matlack asserted that the ICC has exclusive jurisdiction to decide whether the transportation was authorized by Matlack's ICC operating authority, and asked the ICC to institute a declaratory order proceeding to resolve the question of whether Matlack's transportation within Missouri is interstate or intrastate in nature. Because of the pendency of this ICC proceeding, Matlack was able to persuade the assistant county prosecuting attorney assigned to prosecute the traffic tickets to postpone the Missouri court date until the ICC made a decision on Matlack's petition.

On July 31, 1986, some two weeks after Matlack filed its petition with the ICC, an employee of MDOT was informally told by a Chemtech representative that Matlack had filed a petition with the ICC. On August 4, 1986, an MDOT attorney telephoned and then mailed a letter to the ICC, requesting a copy of Matlack's petition and related information, and asking to receive notice of further proceedings. The ICC claims it never received this letter, although it was never returned to the sender. MDOT never received any response to its letter request, was not included on the ICC's service list, and never received any actual notice of the proceeding from any of the parties or the ICC until after the ICC had completed its June 17, 1987, decision. MDOT received a copy of the ICC's decision by mail in June, 1987, after the proceeding was ordered discontinued by the ICC.

On October 15, 1986, the ICC published notice of the declaratory order proceeding in the *Federal Register* and *ICC Register*. Twenty-eight interested parties intervened in response to the Notice by Publication, including the Alabama Public Service Commission (APSC) (Petitioner herein) and were invited to submit comments in the proceeding.

Matlack filed comments supporting its petition for declaratory order, but the only actual evidence filed in support of Matlack was the Verified Statement of Mr. A. Gail Cobb, Director of Traffic For Chemtech. (A copy of Cobb's Statement is included in the Appendix, at p. App. 43, *infra.*) Commercial Cartage Company, an intervenor, filed opposing evidence which included evidence given by this same Mr. Cobb in 1985, when he supported applications for Missouri *intrastate* operating authority covering the same traffic involved here.

According to Mr. Cobb's statement in support of Matlack, all of the commodities shipped by Chemtech outbound from its three Missouri facilities are first shipped to those facilities from origins outside of Missouri. All of these commodities are purchased by Chemtech from manufacturers of those products, and are said to be transported in bulk to Chemtech's Missouri facilities by for-hire barge carriers, by common and contract motor carriers, or by rail transportation. Cobb Statement, at pp. 1-2 (App. 44). After storage in Chemtech's facilities for periods usually not more than thirty days, the commodities are then shipped outbound to Chemtech's customers by common or contract motor carriers and rail carriers, including Matlack. *Id.*, at 2 (App. 44).

Cobb further states that the commodities transported by Matlack are reshipped from Chemtech's facilities in bulk in the same form as they were received there, without being used, consumed or subjected to any "manufacturing process" by Chemtech. *Id.* He asserts that a principal reason Chemtech located these facilities where they did is to facilitate the storage and transfer of inbound bulk commodities from large-volume shipments on barges and railcars into smaller-volume shipments, for delivery to its customers via the outbound rail and motor carrier transportation. *Id.*, at 3 (App. 45).

Matlack emphasizes that 70% to 80% of the volume of products Chemtech receives at these Missouri facilities "is subject to supply contracts and similar sales arrangements" entered into by Chemtech and its customers in

Missouri before the products begin their movements from their out-of-state origins to Chemtech's Missouri facilities *Id.* The remainder of the product volume "as pertinent to the outbound bulk transportation by Matlack" is purchased by Chemtech to supply past customers based on their past ordering practices, but without a contractual agreement in effect when the products are shipped from their out of state origins destined for Chemtech's facilities.

Significantly, Cobb's statement claims *"Chemtech is causing to be shipped to its distribution facilities* volumes of particular commodities" to fill either its contracts with customers or its estimates of its customers requirements. *Id.* However, neither Cobb's statement nor Matlack's comments ever disclosed the identities of the manufacturers that sell these products to Chemtech, or to what extent the sellers "caused to be shipped" volumes of specific commodities to Chemtech's facilities.

No objective evidence is presented in the record to establish whether it was Chemtech, or rather the manufacturers selling their products to Chemtech, who actually owned, hired or otherwise controlled the inbound bulk transportation. Matlack, however, emphasizes the subjective intent of Chemtech that these inbound shipments are intended to remain in interstate commerce as they are delivered, stored and re-shipped at its facilities.

Many of the opposing parties disputed Matlack's factual representations concerning the transportation in question. For example, Commercial Cartage Co. filed certain conflicting previous testimony by Mr. Cobb, and asserted that many of the inbound barges delivering commodities to Chemtech's St. Louis facility were owned and controlled by the manufacturers who supply Chemtech, and thus are private carriers rather than "for-hire barge transportation", as Cobb's statement claims, at 2 (App. 44). It is also asserted that Chemtech commingles these products in bulk storage tanks with similar products regardless of their origins, and that "Chemtech regularly

blends the products to customer specifications before delivery." June 17, 1987 ICC decision, at 3 (App. 15).

These disputed fact issues resulted in requests by numerous opposing parties for discovery, cross-examination of Mr. Cobb at deposition or oral hearing, and full development of the facts concerning the nature of these movements to and from Chemtech's facilities. Opponents also moved for dismissal on jurisdictional grounds.

The ICC denied all these requests, asserting it has primary jurisdiction to interpret the scope of motor carrier authority issued by it, and therefore, to determine that the essential character of Matlack's single-state transportation is not intrastate, but rather was performed in interstate commerce under its ICC permit. The ICC further concluded that requested discovery, deposition, cross-examination and oral hearing were unnecessary to its determination of the character of Matlack's transportation. The ICC declined to engage in any factfinding to resolve these factual disputes, and based solely on Matlack's representation of the facts the ICC concluded that the outbound transportation of bulk commodities from Chemtech's facilities to its customers within Missouri was performed by Matlack in interstate commerce. Based on the ICC's decision, the Missouri county prosecuting attorney dismissed the state criminal prosecutions against Matlack resulting from the three traffic tickets.

After receiving the ICC's decision MDOT and the State of Texas sought to intervene in the proceeding, and with various others petitioned the ICC to reopen the case. In its decision served December 31, 1987, the ICC granted leave for MDOT and Texas to intervene, but denied all the requests to reopen its proceeding. Meanwhile, various parties filed petitions to review the ICC's decision in the Fifth Circuit and the Eighth Circuit, invoking the jurisdiction of the Court of Appeals under 28 U.S.C. §§ 2321(a), 2342(5), and 2349(a). Those review proceedings were eventually consolidated in the Eighth Circuit, which affirmed the decisions of the ICC on review herein.

The Eighth Circuit overruled the objections of numerous parties below asserting the ICC lacked subject matter jurisdiction over Matlack's single-state transportation. The court relied principally on this Court's decision in *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 173 (1959), for its holding that the question of the character of Matlack's outbound leg of the transportation as either part of a continuous interstate operation and covered by its ICC authority, or as separate and intra-state, is "clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation." *Middlewest Motor Freight Bureau v. Interstate Commerce Commission*, Nos. 87-2043 and 87-2419 (8th Cir., Feb. 3, 1989) at 4-5 (The opinion of the court below is attached hereto in the Appendix, *infra*, at App. 1).

On the question of determining the interstate or intrastate character of Matlack's transportation, the Eighth Circuit emphasized this Court's decisions indicating that the fixed and persistent transportation intent of the shipper, at the time when a shipment begins interstate journey toward a destination in another state, is crucial to determining the essential character of the shipment. *Middlewest, supra*, at 5-6 (App. 6); *see Texas & N.O. R.R. v. Sabine Tram Co.*, 227 U.S. 111, 122, 124 (1913); *Baltimore & O.S.W.R.R. v. Settle*, 260 U.S. 166, 174 (1922). However, the Eighth Circuit uncritically accepted the ICC's focus on the subjective intent of Chemtech "to ship to customers", *Middlewest* at 7 (App. 7), as the relevant shipper's intent for purposes of the analysis directed under *Sabine Tram* and *Settle, supra*. Because the ICC found from the facts presented that Chemtech intended for its shipments to be in interstate commerce, the Eighth Circuit followed the ICC's conclusion that this case is distinguishable from *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, (1927), a case relied on by the parties in opposition to Matlack's petition below. In *Atlantic Coast Line*, this Court found nothing on the record to indicate that the ultimate destination of the commodities was fixed in the minds of the *sellers* beyond the primary seaboard storage tanks,—

where the interstate movement ended. In this case, although *Chemtech is clearly the purchaser, not the seller* of the commodities on the inbound shipments to Missouri, the court affirmed the ICC's finding that Chemtech's intent was controlling, such that a continuous interstate movement outbound from Chemtech's facilities was intended.

Significantly, the Eighth Circuit's opinion wholly fails to discuss MDOT's due process objections based on inadequate notice, the implications for federal-state relations resulting from the ICC's preemption of state prosecutions, or the questions concerning the fundamental fairness of the ICC's refusal to permit further factual development of the record. These and related issues were fully briefed and argued in the Court of Appeals, but received no mention whatever in its opinion below. Petitioners seek this Court's review in order to solicit needed judicial resolution of several issues of substantial importance to proper federal-state relations in the area of transportation regulation, which also involve concerns about the unfairness of procedures used and perceived conflicts between the decisions below and applicable precedents among the decisions of this Court.

REASONS FOR GRANTING THE WRIT

1.

The Eighth Circuit has sanctioned an extension by the ICC of its primary jurisdiction beyond the limits of its statutory jurisdiction, based on a misapplication of decisions of this Court and other Circuits concerning its primary jurisdiction, which also conflicts with decisions of this Court limiting federal agency power to preempt state regulation.

Without Congressional authorization, the Eighth Circuit has approved an unwarranted expansion of the ICC's primary jurisdiction beyond specific statutory limits on that agency's powers over single-state transportation by

motor carriers. As a result, the court below has sanctioned a major shift by the ICC in the traditional boundaries between federal and state authority to regulate transportation performed by motor carriers within a single state.

In passing on the ICC's jurisdiction, the Court of Appeals opinion relies on *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), and later cases citing it, for reference to the ICC's authority to interpret federal motor carrier licenses issued by it. None of these cases are apposite here, because they involved factual situations in which the transportation movements in question *actually crossed state boundaries*. The ICC's jurisdiction over such actual interstate truck movements is clear under 49 U.S.C. section 10521(a), and is not disputed here. However, the jurisdiction relied on by the ICC in those cases simply does not apply in this case involving Matlack's transportation performed *entirely within the boundaries of Missouri*. Section 10521(a) gives no authority to the ICC over wholly intrastate truck transportation within a single state, and neither *Service Storage* nor its progeny can fairly be said to apply to Matlack's single-state transportation in issue in this case. This Court's rationale in *Service Storage* of avoiding conflicting interpretations of the meaning of a carrier's ICC certificate by several states is simply not applicable in this single-state situation.

Nor does this Court's concern in *Service Storage* with the uniformity of interpretation of federal motor carrier certificates legitimately apply to the situation presented in this case. It has never been disputed in the proceedings below that Matlack's ICC authority would authorize the movements in question here, *if* those movements are in interstate commerce. *No interpretation of Matlack's ICC permit was needed in this case, and none was in fact undertaken by the ICC's decisions*. Only the character of the transportation, as either interstate or intrastate, was ever in issue, and that is all the ICC actually decided.

The ICC and the Eighth Circuit are confusing two very separate and distinct issues, by misapplying the

ICC's primary jurisdiction to interpret motor carrier licenses issued by it to the separate issue of the essential character of transportation as interstate or intrastate. This confusion is evident in the fact that none of the decisions below even bother to recite the precise wording of Matlack's ICC permit which is supposed to be interpreted. In fact, no terms of art were involved here which required any interpretation. The meaning of Matlack's permit as applied to the facts presented was never in controversy or in need of interpretation. Only the character of the commerce was disputed here, and that does not require any interpretation of the meaning of Matlack's federal motor carrier permit.

The Eighth Circuit opinion holds that this case "is clearly within the ICC's jurisdiction *in interpreting whether its certificate covers the transportation.*" This holding completely blurs the distinctions between whether the certificate "covers the transportation" because of an interpretation of the meaning of the certificate, and whether the certificate "covers the transportation" because of a determination that the character of the transportation is essentially interstate. The ICC's primary jurisdiction over the former question is not disputed. However, until this case no federal court has held that the ICC has primary jurisdiction over the latter question. By so holding, the Eighth Circuit is sanctioning an expansion of the ICC's primary jurisdiction which is unprecedented.

Indeed, the ICC's jurisdiction to interpret federal motor carrier licenses has traditionally been predicated on the underlying jurisdictional prerequisite that the transportation involved is interstate in character and thus subject to ICC authorization by the grant of that license. Except in certain cases involving passenger transportation, the ICC has no authority to grant operating authority covering intrastate transportation by a motor carrier on the highways of a state. 49 U.S.C. section 10521(b)(3) (1982). The determination that a motor carrier's transportation is interstate is prerequisite to any questions of interpretation of that carrier's ICC authority. As stated by

the United States Court of Appeals for the Third Circuit in pertinent part:

> By Valley's own characterization, the issue of which it sought referral was whether the ICC had jurisdiction over the transportation service provided by Trucking and Authority. Yet *the primary jurisdiction doctrine presupposes that the administrative agency to which referral is made has jurisdiction over the subject matter of the action.* Indeed, the rationale of the doctrine is that the subject matter falls so squarely within the agency's domain that a court should permit the agency to initially resolve the question presented. *Valley's argument for referral amounts to the assertion that the ICC has primary jurisdiction to determine its own jurisdiction, a proposition for which there is no support.*

Puerto Rico Maritime Shipping Authority v. Valley Freight Systems, Inc., 856 F.2d 546, 549 (3rd Cir. 1988) (footnote omitted and emphasis added).

In this case the ICC has asserted that its primary jurisdiction to interpret federal motor carrier licenses is the source for its jurisdiction to issue its declaratory order, which decides the character of Matlack's transportation is interstate. But the determination that Matlack's transportation is interstate is a prerequisite to any legitimate exercise of the ICC's primary jurisdiction to interpret Matlack's ICC permit. *Puerto Rico Maritime* persuasively suggests that the ICC does not have primary jurisdiction to determine its own jurisdiction. Applied here, that means that the ICC does *not* have primary jurisdiction to determine whether Matlack's transportation is interstate in character, the fact issue upon which its own jurisdiction is predicated. By affirming the ICC's ruling that it has primary jurisdiction to decide the essential character of Matlack's transportation within a single state, the Eighth Circuit sanctions the ICC's contorted efforts to "bootstrap" its way to a rationale for jurisdiction to decide this case. This Court should set aside the decisions below, in order to confirm the appropriate conclusion, expressed by the Third Circuit in *Puerto Rico Maritime*, that the ICC does not have primary jurisdiction

to decide the question, which is essential to its jurisdiction, of whether the transportation involved is interstate in character.

Although the policies underlying the commitment of the primary interpretation of federal motor carrier certificates to the ICC are well-established, those policies are just not applicable to the determination of the essential character of single-state transportation by a motor carrier. A multitude of federal and state courts and administrative agencies have traditionally been involved in determining the character of commerce as either interstate or intrastate. But by holding that the character of Matlack's transportation is within the ICC's primary jurisdiction, the Eighth Circuit has declared, in essence, that any motor carrier who has ICC authority may preclude state litigation to determine the essential character of his single-state movements. Unless and until the ICC has "interpreted" whether or not the carrier's ICC certificate "covers the transportation", no state court or agency may determine that the carrier's single-state trucking is in intrastate commerce and subject to regulation by the state.

This holding will have grave consequences for the Petitioners, and for other state regulatory agencies, who must face the prospect of filing a complaint with the ICC seeking a determination of the essential character of transportation provided by a carrier operating wholly within the borders of their state, if that carrier possesses an ICC certificate or permit. This raises a very substantial obstacle to the states in enforcing their laws regulating intrastate transportation against the many, many motor carriers who possess ICC interstate authority but also conduct single-state transportation operations. Under the Eighth Circuit's holding, any carrier possessing ICC authority may now demand that the state file *an ICC complaint* to establish that his *single-state movements are in intrastate commerce,* before that state can prosecute him in its own courts or agencies for unauthorized intrastate

transportation, or noncompliance with intrastate rate regulations or safety requirements for intrastate motor vehicle operations.

This unprecedented funneling of disputes concerning the character of trucking movements wholly within a single state, from hundreds of state agencies and courts across the nation to one federal agency for determination in the first instance, threatens not only to severely strain the already-overburdened resources of the ICC, but also to drastically increase the costs and delays which the states must bear in order to enforce their legitimate rights to regulate intrastate trucking within their borders. Surely this Court never intended for its recognition of the ICC's primary jurisdiction to interpret federal motor carrier certificates to be so drastically extended to encompass the single-state transportation of all ICC-authorized carriers, nor to preempt state adjudication of a whole class of cases in which prosecuting the single-state activities of carriers with ICC authority must, by the Eighth Circuit's holding, involve prerequisite federal litigation.

The preemptive effect of the ICC's decision in this case was clearly evident, in that the ICC's intervention into the subject matter of the pending Missouri criminal prosecutions against Matlack resulted in the postponement and ultimate dismissal of the Missouri traffic ticket prosecutions. The ICC's preemption of ongoing state regulatory enforcement with respect to single-state trucking by Matlack is contrary to 49 U.S.C. section 10521(b), in which Congress directed that nothing in the ICC's statutory powers is to affect the power of a state to regulate intrastate transportation by a motor carrier (of property).

In light of this express statutory limitation on the ICC's jurisdiction, the decision below appears to conflict with this Court's opinion in *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986). In that case the Court made it clear that a federal agency may lawfully preempt state law only when and if it is acting within its congressionally delegated authority. In section 10521(b), Congress has expressed its intention

not to delegate to the ICC the authority to preempt state regulation of intrastate transportation, except in regard to certain bus transportation not relevant here. Therefore, this Court should intervene to correct the ICC's unlawful preemption of state regulation which exceeded the agency's statutory limits of jurisdiction and which conflicts with the *Louisiana PSC* decision.

The ICC has demonstrated similar abuses of its statutory jurisdiction in a number of recent cases, in which declaratory order proceedings have been used to preempt threatened or pending state regulatory action by determining whether the essential character of single-state truck movements is interstate. *See, e.g., Armstrong World Industries, Inc. – Transportation Within Texas – Petition for Declaratory Order,* Docket No. MC-C-10963 (I.C.C., April 23, 1986), *petitions to reopen denied* 2 I.C.C.2d 63 (August 23, 1987), *affirmed sub nom. Texas v. United States,* No. 87-4725 (5th Cir., March 6, 1989) (injunction against pending state prosecution denied, 837 F.2d 184 (5th Cir. February 1, 1988), *cert. denied* ___ U.S. ___, ___ S.Ct. ___, ___L.Ed.2d ___(Oct. 3, 1988)); *Quaker Oats Co. – Transportation Within Texas and California – Petition for Declaratory Order,* Docket No. MC-C-30006 (I.C.C., Aug. 10, 1987) (now on review *sub nom. California Trucking Ass'n v. Interstate Commerce Comm'n,* No. 87-7439, and *sub nom. Steere Tank Lines, Inc. v. Interstate Commerce Comm'n,* No. 88-7041 (9th Cir.); *James River Corp. of Virginia – Transportation Through Woodland, CA – Petition for Declaratory Order,* Docket No. MC-C-30044 (I.C.C., Aug. 10, 1987); *Victoria Terminal Enterprises, Inc. – Transportation of Fertilizer Within Texas – Petition for Declaratory Order,* Docket No. MC-C-30002 (I.C.C., Nov. 25, 1987), *decision modified* (Feb. 3, 1989) now on review *sub nom. Steere Tank Lines, Inc. v. United States,* No. 88-4379 (5th Cir.); *Bigbee Transportation, Inc. – Transportation Within Alabama, Mississippi, and Georgia – Petition for Declaratory Order,* Docket No. MC-C-30065 (I.C.C., Nov. 1, 1988) (now on review *sub nom.* ___, No. 88-___ (5th Cir.); *Pacific Coast Building Products, Inc. – Petition for Declaratory Order,* Docket No. MC-

C-30121 (I.C.C., January 13, 1989) (subject of proceeding parallels formal complaint before state agency still pending at time of ICC's decision, *James L. Wright v. Otto Terkildson, Inc.*, Docket No. 88-05-001 (Cal. P.U.C.)); *Arvada Transfer Co., – Petition for Declaratory Order,* Docket No. MC-C-30074 (I.C.C., Mar. 14, 1988) (petition denied without prejudice as premature); *L.E. Matchett Trucking Co., Ltd. – Petition for Declaratory Order,* Docket No. MC-C-30101 (I.C.C., June 30, 1988) (petition denied without prejudice as premature); *Rac Transport Co. – Transportation of Appliances Within Colorado – Petition for Declaratory Order,* Docket No. MC-C-30052 (I.C.C., Sept. 1, 1987) (petition withdrawn at petitioner's request).

With the exception of the *Pacific Building Products,* decision, *supra,* in each case cited above where the ICC has issued a declaratory order on the issue of the essential character of single-state transportation by motor carrier, it has decided that all or a substantial part of the single-state truck movements were interstate in character. The Court should grant certiorari in this case, not only because it is the first of these cases to come before the Court on review of a final decision of the Court of Appeals, but also because of the particular unfairness of the procedures employed by the ICC, and because of the particular similarity of the material facts in this case to those in *Atlantic Coast Line R.R. v. Standard Oil Co.,* 275 U.S. 257 (1927), which should have led the ICC and the Court of Appeals to conclude Matlack's transportation is intrastate in character.

The ICC's expeditions in the foregoing cases into single-state trucking matters previously reserved to the states' regulation has signaled the growing availability of the ICC as a haven for motor carriers and shippers seeking to thwart, delay and intimidate state regulation of intrastate transportation. This trend threatens to undermine the effectiveness of state regulation of intrastate trucking by injecting into wholly single-state situations the probability, that the state must engage in costly and time-consuming federal litigation, as a prerequisite to

direct state enforcement action within state agencies and courts. The decisions of the ICC and Eighth Circuit in this case thus present the imminent prospects of multiplying the costs, delays and difficulties of state regulation of intrastate transportation, and of overburdening the ICC with an increasing number of complaints involving single-state trucking by carriers holding ICC certificates or permits, unless their intrusions into traditionally state-regulated transportation are corrected by this Court. We therefore submit that this case is worthy of the Court's plenary review.

(NOTE: The following points of argument are included for consideration by the Court in addition to the above jurisdictional objections, in the exercise of the Court's supervisory power over inferior federal tribunals. We urge the Court to grant certiorari to consider all of these points, because of the importance of the questions presented, and for the guidance of the ICC and the courts at large, even though the ICC's lack of subject matter jurisdiction as discussed above would be dispositive of the case.)

2.

The ICC abused its discretion by using a declaratory order proceeding to allow Matlack's removal of an anticipated federal defense to state prosecutions from a state court to a federal forum, in conflict with previous decisions of this Court.

The Eighth Circuit has sanctioned an abuse of discretion by the ICC in its issuance of a declaratory order in circumstances which foreseeably resulted in the removal of Matlack's federal defense to state law violations from pending state court proceedings to a federal administrative forum, and ultimately to the federal courts. The ICC's unwarranted intrusion upon the lawful exercise of state regulatory jurisdiction conflicts with prior decisions of this Court, and has important implications concerning proper relationships between the federal and state governments in our federal system.

Matlack's petition for declaratory order acknowledged that it could raise its ICC authority in its defense upon trial of the pending Missouri criminal prosecutions on Matlack's three traffic tickets. Instead, Matlack filed its petition for declaratory order, upon which the ICC proceeded to issue its own ruling on that anticipated federal defense, by declaring that Matlack's transportation within Missouri is essentially interstate in character. This ruling could have no purpose or effect other than to remove the determination of Matlack's asserted federal defense from a Missouri state court to the ICC. The ICC's decision thus preempted the state's authority to regulate Matlack's transportation on which the state prosecutions were based. Because the ICC's declaratory ruling on Matlack's defense was adverse to the state's continued jurisdiction, the state prosecutions were dismissed, effectively depriving the state of any opportunity for adjudication by a state court of the applicability of state law to Matlack's operations.

This Court has long held that the assertion of a federal defense is insufficient to confer federal jurisdiction for purposes of removal of actions to federal courts. *See, e.g., Merrell-Dow Pharmaceuticals, Inc. v. Thompson*, ___ U.S. ___, 106 S.Ct. 3229, 3232 (1986). In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14 (1983), this Court stated that:

> [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if the defense is the only question truly at issue in the case.

Matlack obviously sought an ICC declaratory order to obtain an advance favorable ruling on its anticipated defense to the Missouri state court prosecutions, *i.e.*, a determination that its single-state trucking was not intrastate, but rather interstate in character. This Court has applied the above principles concerning anticipatory removal of a federal defense in the context of a federal

declaratory judgment in *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952). The District Court had granted a declaratory order which declared that a motor carrier's single-state transportation was a continuation of interstate commerce. The Court reversed, citing its concern for the impact of what it held to be an abuse of the discretion inherent in the use of declaratory relief. Of particular concern was the adverse impact on federal-state relations, resulting from that attempt by the motor carrier to preclude threatened enforcment action by the state commission for unauthorized intrastate transportation by means of the federal declaratory order. The Court described the carrier's plan of avoiding state prosecution by an anticipatory removal to federal court, in terms which are highly analogous to the method of removal employed by Matlack in this case:

> The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration that is either intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

Wycoff, supra, 344 U.S. at 247.

In this case, Matlack "rushed into" the ICC, rather than a federal court, to get a declaration which was clearly intended, and successfully used, to "tie the hands" of the State of Missouri with respect to its prosecution of state criminal cases based on Matlack's three traffic tickets. The Court should review this case in order to consider the important question of whether the same adverse impacts on federal-state relations, which resulted from the District Court's declaratory judgment in *Wycoff*, also result from the ICC's declaratory order in this case. As can be seen from the foregoing citation of ICC cases repeating the abuse of the declaratory remedy found in this case, the resolution of this question by the Court would be of timely assistance to lower courts which are and will be reviewing similar ICC decisions, and could prevent the continued abuse of the discretionary declaratory remedy by the ICC.

Even when it is employed by a federal agency rather than a federal court, the remedy of declaratory relief is discretionary in nature. *See* 5 U.S.C. section 554(e). In the interests of preventing the abuse of such discretion by the ICC, and of avoiding the adverse impacts on federalism, Petitioners urge the Court to explicitly extend the application of *Wycoff* to administrative declaratory orders, and to set aside the decisions below which have abused that discretion under circumstances virtually indistinguishable from those found in *Wycoff*.

3.

The ICC committed prejudicial procedural errors, left uncorrected by the Eighth Circuit, which so deprived Petitioners of a fair adjudication that this Court should exercise its power of supervision over these inferior federal Tribunals to prevent injustice.

The ICC explicitly instituted its declaratory order proceeding under 5 U.S.C. section 554(e), which authorizes discretionary issuance of declaratory orders "to terminate a controversy or remove uncertainty". 5 U.S.C. section 554(e) (1982). But the unfair procedures employed by the ICC deprived Petitioners of any fair adjudication of the facts necessary to terminate the controversy, resulting in a decision "so wanting in fact and tenuous in conclusion", June 17, 1987 ICC Decision, at 9 (App. 24) (Lamboley and Simmons, CC., dissenting), that it has only created uncertainty.

First, the ICC failed to provide adequate notice to the State of Missouri, the one party whose adverse interest in the proceeding was explicitly identified in Matlack's petition to the ICC. The only notice given of the proceeding was notice by publication in the *Federal Register* and *ICC Register*. The special interests of Missouri in notice and an opportunity for hearing in a proceeding which sought to preempt and/or remove pending state prosecutions against Matlack entitled the State of Missouri to notice

more likely to apprise it of the pendency of the proceeding and the nature of Matlack's claims than mere notice by publication alone. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). By failing to give such individual notice to Missouri, an adverse party of known identity, interest and location, the ICC's publication notice conflicts with *Mullane*, and fails to afford due process of law as required by the Fifth Amendment to the United States Constitution. It also failed to comply with statutory requirements for notice under the Revised Interstate Commerce Act and the Administrative Procedure Act. *See* 49 U.S.C. section 10306(c) (1982) (requires service of notice in the manner used by U.S. courts); section 10328(b) (1) (requires reasonable notice to interested persons *under regulations* of the ICC – no such regulations provide for notice by publication in declaratory proceedings); 5 U.S.C. section 554(b) (content of notice required); sections 552(a)(3), 555(e) (required response to information requests concerning agency proceedings).

Second, the ICC denied Petitioners' requests for discovery, and cross-examination of Matlack's witness, Mr. A. Gail Cobb, at deposition or oral hearing. The ICC deemed these efforts to develop the essential facts surrounding Matlack's transportation, including the preceding (inbound) transportation, as unnecessary. But the ICC fails to recognize that 5 U.S.C. section 554(c) (2) makes the procedural requirements of sections 556 and 557 applicable to this case. These requirements include a party's right to present his case by oral evidence, "and to conduct such cross-examination as may be required for a full and true disclosure of the facts". 5 U.S.C. section 556(d) (1982). The ICC acknowledged that the facts are crucial to the determination of the essential character of the transportation. June 17, 1987 ICC Dec., at 2, 8-9 (App. 12, 23-24); Dec. 31, 1987 ICC Dec., at 7-8 (App. 38-39). Yet the ICC refused all of the Petitioners' efforts to develop the factual record.

Third, the ICC explicitly declined to engage in any factfinding, which was necessary to any valid determination of the controversy. The ICC, without any authority for the proposition, asserts that because this was a declaratory order proceeding, it was not an adversary proceeding, that no factfinding (and hence, no discovery or oral hearing) was needed, and that its decision was "limited to the facts presented", *i.e.* by Matlack. June 17, 1987 ICC Dec., at 2, 8-9 (App. 12, 23-24); Dec. 31, 1987 ICC Dec., at 3-4, 5 n. 8, 7-8 (App. 38-39). This fails to comply with the clear directive of the Administrative Procedure Act that:

> A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence.

5 U.S.C. section 556(d) (1982); *accord*, 5 U.S.C. section 706 (1982).

The ICC inocuously asserts that its "nonadversary" handling of this proceeding "limited to the facts stated", will not prejudice any party. June 17, 1987 ICC Dec., at 2 (App. 12). That is a whitewash of its totally unfair procedure, especially when one considers that by asserting its primary jurisdiction, and preempting state court or agency adjudications of the character of Matlack's transportation, the ICC foreclosed any other tribunal from engaging in factfinding to decide the character of Matlack's subject transportation, based on a factual record appropriately developed by discovery, cross-examination and confrontation at hearing.

Despite the ICC's suggestion that parties are not precluded from filing a complaint to show a *different* set of facts, if this case is truly within the ICC's primary jurisdiction then the precise issue of the character of this transportation cannot be relitigated elsewhere. The ICC implicitly claims that its decision is conclusive on these "facts", a conclusion which its unfair procedures do not justify. *See Anthan v. Professional Air Traffic Controllers Org'n*, 672 F.2d 706, 709 (8th Cir. 1982) (administrative

collateral estoppel requires, *inter alia*, a full and fair opportunity to litigate the issue to be precluded).

Prejudice clearly resulted in this case both to Missouri, by the dismissal of its state prosecutions solely on the basis of the ICC's prior "adjudication", and to all parties who intervened in the case and were entitled to a fair opportunity to litigate the issues and to obtain a true disclosure of the facts. The ICC disguised as an "adjudication", what in reality was a one-sided process by which a private party obtained an advisory opinion from the ICC (and the Eighth Circuit) based on hypothetical "fact pattern", which it used to insulate itself against lawful state proceedings on the issue involved.

The Eighth Circuit completely neglected to address these points of improper procedure in its opinion, although they were fully briefed and argued to the Court. Petitioners therefore urge this Court to exercise its power of supervision and to correct these procedural aberrations by the ICC, which were tacitly approved by the Court of Appeals.

4.

The conclusion by both the ICC and the Eighth Circuit that Matlack's single-state motor carrier transportation is essentially interstate in character conflicts with applicable decisions of this Court rendered in the context of rail carrier transportation.

A final reason why the writ of certiorari should be granted is that the decision on the merits, *i.e.* that Matlack's single-state motor carrier transportation is essentially interstate, is in conflict with several decisions of this Court. Although these decisions were rendered by this Court in the context of rail carrier transportation within a single state, we urge the Court to clarify that these precedents are equally applicable to determine the essential character of single-state motor carrier transportation as well.

In *Pennsylvania R.R. v. Public Utilities Comm'n of Ohio*, 298 U.S. 170 (1936), this Court affirmed the jurisdiction of the State of Ohio over outbound single-state rail transportation from a distribution point within that state, which followed previous interstate transportation of bulk commodities to that distribution point by *unregulated*, exempt interstate carriers. The Court determined that the relevant transportation for purposes of regulatory authority began when the bulk commodities were first delivered to a *regulated* carrier, for the outbound, intrastate transportation movement. In this case, the record similarly disclosed that some of the chemicals shipped outbound from Chemtech's facilities at St. Louis in Matlack's trucks were received at Chemtech's facilities by *unregulated* interstate exempt water carriers. Yet the ICC and the Eighth Circuit failed to follow this Court's decision in *Pennsylvania R.R.* If that decision were applied here, a proper analysis of this case would identify Matlack's transportation of that portion of the commodities that previously moved to Chemtech's facilities by exempt interstate water carriers as intrastate transportation for purposes of regulation.

In *Atlantic Coast Line R.R. v. Standard Oil Co. of Kentucky*, 275 U.S. 257 (1927), the facts were virtually identical to those presented in this case, except that the outbound single-state transportation of bulk commodities, which had previously moved by interstate transportation to bulk storage and distribution facilities, was by rail carrier rather than by motor carrier as here. The ICC and Eighth Circuit should have followed *Atlantic Coast Line* and found here that Matlack's outbound transportation was intrastate. In *Atlantic Coast Line*, as here, when the bulk commodities were previously delivered by interstate carriers and commingled in storage with other like commodities, until being reshipped by a separate carrier to further destinations within the same state, the outbound single-state transportation is a separate, intrastate movement.

The ICC and Eighth Circuit attempted to distinguish *Atlantic Coast Line* on the basis of Chemtech's subjective

intent that the commodities should "continue movement through" its facilities, and thus remain in interstate commerce. But Chemtech is not the "shipper" whose intent is relevant to a determination of the essential character of the subject transportation, because it was the *purchaser* with respect to the inbound, interstate movements, not the *seller*. In *Atlantic Coast Line*, this Court appropriately focused instead on the transportation intent of the *sellers* who delivered the commodities in interstate commerce to Standard Oil's storage facilities, without any fixed intent that the commodities should move on and continue their interstate journey beyond the initial interstate destination. In this case, the transportation intent and even the identities of the manufacturers who sold and shipped the commodities in interstate commerce to Chemtech are nowhere in evidence.

This improper focus by the decisions below on the intent of the *receiver* of goods transported interstate to a distributor or wholesaler, for eventual reshipment to further destinations within the same state, will create widespread opportunity for evasion of proper intrastate transportation regulation. It would let every intermediate distributor or wholesaler of goods to rely on his subjective business intent, of profiting on the resale and distribution of the goods, to convert heretofore intrastate shipments of goods, outbound from storage facilities to customers within the same state, into "continuing interstate movements". This result further extends the reach of "essentially interstate" transportation beyond the limits appropriately determined by this Court in cases such as *Pennsylvania R.R.* and *Atlantic Coast Line*. The Court should review the decisions below to enforce a proper distinction between interstate and intrastate transportation within a single state, and to correct this unwarranted extension of federal power over single-state transportation which should remain subject to regulation by the several states.

CONCLUSION

For the reason stated above, this Court should grant a writ of certiorari to the Eighth Circuit, in order to enforce conformity of decisions with this Court's previous decisions, to correct the ICC's abuses of discretion and procedural errors in its misuse of declaratory relief, and to restore the traditional balance between federal and state authority over single-state motor carrier transportation which has been substantially upset by the decisions below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2043

Middlewest Motor Freight Bureau, National Motor Freight Traffic Association, Inc., New York Motor Carrier Conference, Central States Motor Freight Bureau, Inc., Eastern-Central Motor Carriers Association, Inc., Central & Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, New England Motor Rate Bureau, Inc., Southern Motor Carriers Rate Conference,	*	On Petition for Review of an Order of Interstate Commerce Commission.
Petitioners,	*	
v.	*	
Interstate Commerce Commission and United States of America,	*	
Respondents.	*	

No. 87-2419

Steere Tank Lines, Inc., *
Petitioner, *
v. *
Interstate Commerce Commission and United States of America, *
Respondents. *

Submitted: October 20, 1988
Filed: February 3, 1989

Before LAY, Chief Judge, McMILLIAN and WOLLMAN, Circuit Judges.

LAY, Chief Judge.

In July, 1986, Matlack, Inc. (Matlack), a transportation company, filed for a declaratory order with the Interstate Commerce Commission (ICC) to determine whether Matlack's ICC certificate covered certain shipments of bulk chemicals provided to the St. Louis facility of Chemtech Industries, Inc. (Chemtech). The chemicals were to be delivered within the State of Missouri as part of a continuous interstate transportation service. The ICC instituted a proceeding, published notice in the *Federal Register* and solicited comments. Twenty-eight parties filed comments.

In June, 1987, the ICC issued a decision finding the traffic to be part of continuous interstate transportation. *Matlack, Inc.*, No. MC-C-10999 (ICC June 1, 1987) [hereinafter *Matlack I*]. The ICC also denied requests for discovery, determining that the record contained all the facts necessary to reach an informed decision. Following the June decision, several petitions to reopen were filed. In December, 1987, the ICC denied the petitions and affirmed the June decision. *Matlack, Inc.*, No. MC-C-10999 (ICC Dec. 16, 1987) [hereinafter *Matlack II*]. Middlewest Motor Freight Bureau and others instituted a petition for review seeking reversal of the ICC's declaratory order.[1]

Matlack holds an ICC certificate to transport general commodities under contracts with manufacturers and distributors of chemicals and related products. Chemtech maintains facilities at Kansas City, St. Louis and Springfield, Missouri. Chemtech receives products from out-of-state origins and at its Missouri facilities converts large inbound quantities into smaller outbound quantities. Shipments are made to customers throughout Missouri. Chemtech's affidavit to the ICC indicated that seventy to eighty percent of the bulk product received is subject to supply contracts consummated in advance of the product

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[1] Petitioners are organizations, commonly known as rate bureaus, composed of motor common carriers of property operating in interstate and foreign commerce pursuant to authority issued by the Interstate Commerce Commission (ICC), and in intrastate commerce pursuant to authority issued by the various states. The ICC granted petitions to intervene by the State of Texas and the Missouri Division of Transportation (MDOT), but denied Texas' motion to consolidate and dismiss.

shipment to Missouri facilities. The remainder is purchased to fill requirements of known customers based on past practice.

Missouri officials issued citations to Matlack claiming the movements were intrastate transportation requiring state approval.

Petitioners initially argue the ICC lacked jurisdiction to decide whether the transportation was interstate or intrastate. Second, they assert that even assuming jurisdiction, the decision was arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence on the record as a whole. We find jurisdiction and we affirm the decision of the ICC.

Jurisdiction

The Supreme Court has held that the ICC has primary jurisdiction to interpret federal motor carrier licenses. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 173 (1959); *see also Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554, 558 n.4 (1958); *Gray Lines Tour v. ICC*, 824 F.2d 811, 815 (9th Cir. 1987). In *Service Storage* the Court held that the interpretation of an interstate commerce certificate should first be litigated before the ICC under 49 U.S.C. § 304(c) (now recodified at 49 U.S.C. § 11701(b)). *Service Storage*, 359 U.S. at 173. Section 11701(b) provides that any person "including a governmental authority" may file a complaint with the ICC alleging that a carrier operating under an ICC certificate is transporting in excess of its authority. *Id.* The Court held that "interpretations of federal certificates [which on their faces cover the operations] should be made in the

first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." *Id.* at 177. The Court reasoned that by leaving the interpretation of ICC certificates to the ICC, conflicts between state and federal authorities can best be avoided. *Id.* at 178.[2]

Petitioners claim the ICC certificate does not cover Matlack's deliveries to Chemtech in St. Louis because the operation takes place wholly within Missouri and is thus intrastate. The question is whether the transportation from the distribution point in Missouri to customers in Missouri is part of a continuous interstate operation originating outside of Missouri and is thus covered by the ICC certificate, or whether the second leg of transportation is separate and wholly intrastate. We hold the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation. *See Jones Motor Co. v. Pennsylvania Pub. Util. Comm'n*, 361 U.S. 11 (1959). *Merchants Fast Motor Lines, Inc. v. ICC*, 528 F.2d 1042, 1044-45 (5th Cir. 1976) (a party claiming that a carrier is in violation of its ICC certificate has recourse to the ICC initially).[3]

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[2] Section 5(d) of the Administrative Procedures Act (APA) places the power to grant declaratory relief in the sound discretion of the agency. 5 U.S.C. § 554(e) (1982). An agency may issue a declaratory order to terminate a controversy or to remove uncertainty. *Id.*

[3] In *Texas v. United States*, 837 F.2d 184 (5th Cir.), *cert. denied sub nom. ICC v. Texas*, ___ U.S. ___, 109 S. Ct. 65 (1988), the Fifth Circuit denied the ICC's motion for preliminary injunction to preclude a state court enforcement action regarding shipments that the ICC has determined to be interstate,

(Continued on following page)

Judicial Review

This court will set aside agency action only if it is arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence on the record as a whole. 5 U.S.C. § 706(2)(A)(E). This is a narrow standard. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974). It is axiomatic that this court is not to substitute its judgment for the agency's. *Humphrey v. United States*, 745 F.2d 1166, 1170 (8th Cir. 1984).

In *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111 (1913), the Supreme Court held that the determination of whether transportation between two points within a state is part of a larger interstate transportation service depends on the essential character of the shipment. *Sabine*, 227 U.S. at 122. A crucial factor in determining the character of a particular shipment is the "original and persisting intention of the shippers." *Baltimore & O.S.W.R.R. v. Settle*, 260 U.S. 166, 174 (1922); *see also Sabine*, 227 U.S. at 124. The *Sabine* Court found that the time When a shipment of goods can be ascribed to interstate commerce is when shipment begins its transportation for destination in another state. *Sabine*, 227 U.S. at 123.

(Continued from previous page)

rather than intrastate, in nature. The court left open the question of whether the ICC had jurisdiction to issue the declaratory ruling. This is the question now before us. A petition for review is currently pending before the Fifth Circuit to determine that question. Argument was heard on that issue September 9, 1988. No decision has yet been filed.

The ICC determined in *Armstrong World Indus., Inc.*, 2 I.C.C. 2d 63 (Apr. 3, 1986), that there is no formula to apply in determining intent. Instead, intent should be determined from the facts and circumstances which surround the transportation. *Id.* at 69.

In the *Matlack I* decision of June 1, 1987, the ICC found from the facts presented that:

> [I]t is evident from the facts presented that Chemtech intended for its shipments to be in interstate commerce. The involved shipments move from out-of-State points of origin to the St. Louis distribution terminal and from there to their ultimate destination, almost always within 30 days. Since the vast majority of shipments involve supply contracts and other sales arrangements entered into prior to shipment, Chemtech knows, in almost all cases, the final destination from the moment the shipment leaves its out-of-State origin. Moreover, no manufacturing or processing takes place at St. Louis. Rather, Chemtech maintains a storage facility there simply to enable it to convert large volume inbound movements into the smaller outbound volumes its customers need.

Matlack I, No. MC-C-10999, slip op. at 4 (ICC June 1, 1987) (footnotes omitted).

From these facts, the ICC determined that the chemicals did not "come to rest" in St. Louis and did not interrupt the continuity of the original movement in interstate commerce. The ICC found the record demonstrated Chemtech's intent was to ship to customers. Therefore the ICC determined that any movements from St. Louis to points within Missouri were deemed interstate commerce.

Petitioners argue the facts of this case are analogous to *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257 (1927), and that *Atlantic* is controlling. The ICC distinguished this case because in *Atlantic* the Court found no intent at the time of initial movement that the product be shipped beyond the storage facilities.

The controlling fact in *Atlantic* is that:

> [T]he plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily * * * . There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company * * * .

Atlantic, 275 U.S. at 269. In contrast, the ICC clearly found that Chemtech intends that its product continue movement through St. Louis for delivery to known customers. *Matlack I*, slip op. at 5.

Under the facts presented we cannot say that the ICC's finding that the essential character of the shipment is interstate commerce is arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence on the record as a whole. The decision of the ICC is hereby affirmed.[4]

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[4] Subsequent to its decision in *Matlack I and II*, the ICC declined to issue a declaratory order to determine whether

(Continued on following page)

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Continued from previous page)

certain transportation was interstate or intrastate in nature. *Arvada Transfer Co., Inc. – Petition for Declaratory Order,* No. MC-C-30074 (ICC Mar. 8, 1988). That decision is consistent with *Matlack I and II;* in *Arvada* the state had not yet taken a position as to the nature of the transportation, so there was not yet a controversy to be determined by the ICC. In addition, *Arvada* stated that the criteria and analysis set forth in *Matlack I and II* should provide guidance for the resolution of controversies over the characterization of transportation. We find that *Arvada* does not represent a change in ICC policy of providing the proper forum to interpret Federal Motor Carrier certificates.

INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-C-10999
MATLACK, INC. – TRANSPORTATION WITHIN MISSOURI – PETITION FOR DECLARATORY ORDER

SERVICE DATE
June 17, 1987

Decided: June 1, 1987

Matlack, Inc. (Matlack) seeks a declaratory order determining whether certain transportation movements within Missouri are interstate or intrastate in nature. By decision served October 15, 1986, we granted the petition and instituted this proceeding. Notice of the proceeding was published in the *Federal Register* and the *I.C.C. Register,* inviting comments from interested parties. Twenty-eight parties filed comments. Matlack replied. We conclude that the involved movements are performed in interstate commerce.

PRELIMINARY MATTERS

Various procedural matters have been raised in this case. Specifically, Steere Tank Lines, Inc., Southern Gulf Trucking, Inc., and Great Western Trucking, Inc., jointly, and Ward Transport, Inc., Groendyke Transport, Inc., and Petco, Inc., Interstate, jointly, request and order to take the deposition of A. Gail Cobb, Director of Traffic of Chemtech Industries, Inc., the firm from and to whose facilities the involved traffic moves. Jarvis Leasing, Inc., The Maxwell Co., Propane Transport, Inc., Truckway Service, Inc., and Weiss Trucking Company, Inc., jointly,

indicate that they join in these petitions. Steere and other parties also request an oral hearing. Moreover, the National Motor Freight Traffic Association, Inc. (NMFTA), in comments submitted jointly with 10 motor carrier rate bureaus requests that the filing dates of this proceeding be postponed for 90 days to "facilitate discovery." It requests an opportunity to develop facts "through interrogatories, depositions, and other means of discovery," although it does not specify what facts not already of record are necessary to resolve the question presented to us. All the petitions will be denied. The written record contains all the facts needed to reach an informed decision.

Those seeking discovery contend that the pleadings submitted by Matlack and Chemtech omit essential facts. They raise numerous questions that they assert must be answered to enable the Commission to engage in reasoned decision making. Petitioners argue that a failure to allow the deposition will leave the Commission without an adequate record upon which to make a decision in this matter.

On the other hand, Matlack contends that discovery is not appropriate in this proceeding and that no oral hearing is required. Furthermore, Matlack points out that none of the petitions is verified, as required by 49 CFR 1114.21(b)(1), that none was served upon the person sought to be deposed, as required by 49 CFR 1114.22(b)(2), and that all contemplate postponement, contrary to the requirements of 49 CFR 1114.21(b)(3). Matlack argues, also, that none of the information sought is relevant, and that the petitioners are attempting to broaden the issues involved.

We order the taking of depositions only when it is necessary to prevent a failure or delay of justice. 49 CFR 1114.22(c). The taking of depositions is neither contemplated nor required in this proceeding. Nor is there a need for discovery or an oral hearing. While this record is not as complete as all parties may wish, we can make an interpretation on the facts presented.

This is a declaratory order, not an adversary, proceeding. Accordingly, our decision is limited to the facts presented. If Matlack has not described the transportation at issue accurately, or if in fact it performs other service that differs significantly from that described, then our findings will not apply to that transportation. Thus, no parties will be prejudiced by our handling of this proceeding on the basis of the written statements already filed. Our interpretation is limited to the facts stated and does not preclude further challenges to the carrier's operations in different circumstances. Therefore, we will issue our declaratory order at this time. Interested parties have had an adequate opportunity to make their views known. Permitting discovery is unnecessary and would result in needless delay.

Steere, et al. move to dismiss or deny Matlack's petition. We have already granted Matlack's petition to the extent of instituting this declaratory order proceeding, and we find no good cause to refrain from treating the substantive issues raised in the various comments. The motion will be denied.

The same parties also move to strike a portion of Matlack's reply comments. They charge that the assertion of Matlack's counsel that Chemtech controls the traffic

moving to its distribution facilities from out-of-State origins is unsupported by the verified statement of the shipper and is incorrect. We will not strike the challenged matter. As Steere acknowledges, the Chemtech witness stated: "Chemtech is *causing to be shipped* to its distribution facilities volumes of particular commodities in order to fulfill contractual arrangements with customers entered into in advance." [Emphasis added.] We think this language provides an adequate basis for Matlack to *argue* that Chemtech controls this transportation. In the final analysis, the issue here is one of credibility, *i.e.*, how strong is the evidence in support of Matlack's assertion. Matlack's argument is neither improper not irrelevant. Accordingly, we have considered both Matlack's claims and Steere's rebuttal evidence.

BACKGROUND

Matlack holds motor contract carrier authority in Permit No. MC-107403 (Sub-No. 1355) to transport general commodities, including bulk commodities, between points in the United States, under continuing contract(s) with manufacturers, distributors, and receivers of, among other commodities, chemicals and related products. It does not hold any Missouri intrastate authority. Matlack serves Chemtech, of St. Louis, MO, under contract, transporting chemicals in bulk from Chemtech's St. Louis facility to other points in Missouri and to destinations outside that State. All of the involved shipments originate out-of-State. Since June 1986, Matlack has received citations from Missouri officials claiming that the movements within Missouri are intrastate in nature and are being

performed without required Missouri intrastate operating authority.

Chemtech is a manufacturer and distributor of chemicals and related products. As pertinent, it operates distribution facilities at St. Louis, Kansas City, and Springfield, MO. Chemicals move in bulk to these three facilities from points outside Missouri by barge, rail, and motor carrier. Most of these commodities are purchased from other companies. Chemtech reships them in bulk by motor and rail carrier. They undergo no further processing at Chemtech's facilities, and they rarely remain at the facilities for more than 30 days prior to reshipment. None of the products is used or consumed by Chemtech.

Matlack states that Chemtech operates the three distribution facilities principally to break large volume barge, rail, and motor carrier shipments into smaller motor carrier or rail shipments. Seventy to 80 percent of the product received at these facilities from outside Missouri is already subject to existing customer supply contracts. Chemtech purchases the remainder to meet the future requirements of known customers based on their historical need.

Matlack contends that its transportation of these chemicals within Missouri is in interstate commerce and is not subject to State regulation. As indicative of the interstate nature of the movements, it cites a fixed and persisting intent by Chemtech at the time of shipment that all the chemicals continue moving beyond its distribution facilities to ultimate destinations in Missouri and elsewhere. Matlack argues that Chemtech operates these facilities to transfer the chemicals conveniently from one

transportation mode to another and to control its own customer delivery schedules more efficiently.

The Department of Transportation and the National American Wholesale Grocers Association were among those filing comments in support of Matlack's position. Surprisingly, the State of Missouri has not participated in this proceeding.

Of the opposing parties, many challenge Matlack's presentation of the facts. Commercial Cartage Company states that many of the shipments arriving at Chemtech's St. Louis facility have moved in private barges owned by the manufacturers of the bulk products Chemtech is purchasing and that other products are purchased within Missouri and moved to the St. Louis facility in intrastate commerce. It asserts that these products are stored in common storage tanks with similar products regardless of their origin, and that Chemtech regularly blends these products to customer specifications before delivery.

Several other parties point out that Matlack has failed to describe with enough specificity the nature of the shipments to Chemtech's facilities, the operations of these facilities, or the nature of the outbound shipments within Missouri. For example, the comments of Jarvis Leasing, Inc. et al. point out that only one specific movement is described and that the record does not show the nature of the supply contracts between Chemtech and its customers. Similarly, the comments of Ward Transport, Inc., et al. raise various questions about the nature of the transportation services Matlack provides, and argue that the facts of record do not permit a determination as to the shipper's "persistent intent."

DISCUSSION AND CONCLUSIONS

This proceeding is but one of several now and recently before the Commission that share the issue of the distinction between interstate commerce and intrastate commerce when considering transportation by motor carrier within a single State. Two already have been decided: *Armstrong, Inc. – Transportation within Texas*, 2 I.C.C.2d 63 (1986), and Ex Parte No. MC-182, *United States Department of Transportation – Petition for Rulemaking – Single-State Transportation in Interstate or Foreign Commerce* (not printed), served February 12, 1987 (*DOT Single State*).

In *Armstrong*, we considered the motor transportation of carpet between Arlington, TX, and other Texas points, after a prior movement from Dalton, GA. We found this transportation to be part of a continuous interstate movement, lawfully performed under a storage-in-transit provision contained in an appropriate tariff. In *DOT Single-State*, we declined to institute a rulemaking proceeding to assert jurisdiction over single-State motor carrier for-hire transportation movements when these movements: (1) are combined with interstate or foreign nonregulated movements by private or exempt, for-hire carriers; or (2) follow a stop at a storage or distribution facility, when it is the shipper's persistent and continuing intent to ship goods in interstate or foreign commerce.

We noted in *Armstrong* that whether transportation between two points in a State is interstate or intrastate in nature depends on the "essential chatacter" of the shipment. *Texas & N.O.R.R. v. Sabine Tram Co.*, 227 U.S. 111, 122 (1913). Crucial to a determination of the essential

character of a shipment is the shipper's fixed and persisting intent at the time of shipment. *Baltimore & O.S.W.R.R. v. Settle*, 260 U.S. 166, 170 (1922). This intent is ascertained "from all the facts and circumstances surrounding the transportation." *Armstrong*, 2 I.C.C.2d at 69. There is no set formula to apply.

Here, it is evident from the facts presented that Chemtech intended for its shipments to be in interstate commerce.[1] The involved shipments move from out-of-State points of origin to the St. Louis distribution terminal and from there to their ultimate destination, almost always within 30 days. Since the vast majority of shipments involve supply contracts and other sales arrangements entered into prior to shipment, Chemtech knows, in almost all cases, the final destination from the moment the shipment leaves its out-of-State origin.[2] Moreover, no manufacturing or processing takes place at St. Louis. Rather Chemtech maintains a storage facility there simply to enable it to convert large volume inbound movements into the smaller outbound volumes its customers need.

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[1] It is true that here, unlike *Armstrong*, there are no storage-in-transit provisions. However, this is not a fatal variance. *Southern Pacific Term. Co. v. ICC*, 219 U.S. 498, 527 (1911). *See also Settle*, 260 U.S. at 171.

[2] Where there is no formal sales contract, Chemtech intends for the interstate journey to terminate not at St. Louis, but on delivery to its customers. Thus, the requisite intent is present on those shipments as well. *See Armstrong*, 2 I.C.C.2d at 71, 74 ("it is unimportant that the ultimate destination and consignee of each particular shipment is not known" prior to shipment).

In these circumstances, we conclude that the chemicals move through the storage facilities without "coming to rest" and interrupting the continuity of the original movement in interstate commerce. Whatever storage takes place is incidental, and serves to facilitate orderly and convenient transfer of the chemicals to the motor mode of transportation in quantities suitable for delivery. The question of whether goods come to rest in a warehouse or other storage facility must be decided on a case-by-case basis. Different factors may be important in certain types of cases, but may or may not be present or identified in others. *See Petroleum Products Transported within a Single State*, 71 M.C.C. 17, 29 (1957). Here, the record demonstrates that Chemtech's intent is to ship not to St. Louis but to its customers. Therefore movements from St. Louis to other Missouri points must be deemed to be in interstate commerce. *See Settle, supra; Sabine*, 227 U.S. at 126; *Southern Pacific*, 219 U.S. at 527.

Several parties rely on *Atlantic Coast Line R.R. v. Standard Oil Co. Of Kentucky*, 275 U.S. 257 (1927). In that case, however, the Court emphasized that there was no intention at the time of the initial movement of the petroleum products involved that they be destined beyond the storage facilities.

> The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the State to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being

> carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate, and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. *There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal.* 275 U.S. at 269 [3] (emphasis added).

Here, by contrast, it is clear that Chemtech intends the chemicals to continue their movement through the storage facilities for delivery to known customers. Thus, *Atlantic Coast Lines* is inapposite.[4]

Nor does the fact that Chemtech's products are temporarily stored at St. Louis destroy the continuity of the single interstate movement from the product's origin point (which is always outside Missouri) to Chemtech's customers. The commodities involved move through the shipper's facilities in a reasonably expeditious and efficient manner. As discussed above, these chemicals move through Chemtech's facilities to accomplish the transfer from the large-volume, vehicle-lot quantities in which

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[3] *See also* 275 U.S. at 265, 267.

[4] *Petroleum Products by Motor Carriers within A Single State, supra,* also is distinguishable. With one exception, all the shippers in that case testified that the shipments involved came to a definite rest at the terminal storage facility and that subsequent distribution from that point was separately conceived and newly executed arrangement. The transportation involved also did not move by supply contract or specific order.

they arrived into the smaller-quantity shipments required for delivery to the individual customers. According to Chemtech, none of the chemicals is used or consumed by Chemtech and no manufacturing or processing takes place at St. Louis. It is well settled that where a warehouse serves only as a temporary storage to permit orderly and convenient transfer of goods from one form of transportation to another in the course of carrying out what is intended as a continuous movement to destination, the continuity of the movement is not broken. *See Rogers Transfer, Inc. Declaratory Order,* 126 M.C.C. 448, 454 (1977). This precedent provides strong support for our finding that this is interstate transportation.

Furthermore, since most of this traffic is moving in response to existing customer contracts and the remainder represents the shipper's expectations of the demand of its known customers, based on its own marketing expertise, there is a clear and rational connection between the arriving and departing shipments. This is shown by the fact that the chemicals rarely remain at the shipper's facility longer than 30 days, a time frame short enough not to interrupt the continuity of movement. Obviously, innumerable molecules of these chemicals may remain in the tanks almost indefinitely, but it is only appropriate to account for the chemicals on a "first in, first out" basis. Moreover, the fact that the chemicals are fungible does not change our conclusion that these shipments constitute a continuous movement in interstate commerce.

It must be accepted that commodities passing through a "break-bulk" terminal of any kind may remain in temporary storage for some period of time (depending on the frequency of the incoming bulk movements or the

number of deliveries that are made out of an incoming bulk movement) without "coming to rest" and ceasing to be part of continuous, interstate transportation. Thus, the interruption in the movement is operationally *de minimus* and nothing more than the ordinary consequence of the transfer from the large barge, carload, or multi-truckload lots in which the chemicals arrived, to smaller quantities that are to be delivered to customers.

In sum, Chemtech's intent that the chemicals move to its customers is clearly formed before they reach its facilities, by virtue of its existing customer contracts and projections of the demands of known customers. In those circumstances it is unimportant whether Chemtech actually controls its inbound traffic, whether there are storage-in-transit tariff provisions, or whether these chemicals must be placed in storage tanks to be transshipped from large bulk quantities for delivery to individual customers in smaller bulk amounts, since the chemicals remain in storage only temporarily (rarely in excess of 30 days) and move on to their destinations in a reasonably prompt and expeditious manner.

Because we have determined that the described shipments within Missouri are in interstate commerce, it follows that they are not subject to State regulatory jurisdiction. *Buck v. Kuykendall*, 267 U.S. 307, 315-316 (1925). As we observed in *DOT Single-State*, however, this does not necessarily mean that they are all subject to our jurisdiction, either. To the extent a movement by motor carrier, within a single State, precedes or follows an unregulated movement (for example, an exempt movement by water carrier, as particularly pertinent here) in interstate or foreign commerce, the case law is clear that

such transportation, although still in continuous interstate or foreign commerce, is not that particular form of interstate or foreign commerce that is subject to Federal regulatory jurisdiction. *Pennsylvania Railroad v. Public Utilities Commission*, 298 U.S. 170 (1936); *Motor Transportation of Property within Single State*, 94 M.C.C. 541 (1964), *aff'd per curiam sub nom. Pennsylvania Railroad v. United States*, 242 F.Supp. 890 (E.D. Pa. 1965), *aff'd per curiam sub nom. American Trucking Associations v. United States*, 382 U.S. 372 (1966); *Allen – Investigation of Operations and Practices*, 126 M.C.C. 336 (1977). Thus, to the extent Chemtech's incoming shipments are exempt transportation, Federal jurisdiction over continuing outbound movements does not attach.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

We find:

The transportation of chemicals by Matlack within Missouri as described on this record, is part of a continuous interstate movement.

It is ordered:

1. The petitioners requesting postponement, discovery, an oral hearing, and an order to take a deposition are denied.

2. The motion of Steere et. al. to strike a portion of the reply is denied.

3. The motion of Steere et. al. to dismiss or deny Matlack's petition is denied.

4. This proceeding is discontinued.

5. This decision is effective on its service date.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley, joined by Commissioner Simmons, dissented with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN LAMBOLEY, joined by *COMMISSIONER SIMMONS,* dissenting:

Presumably, this proceeding had a beneficial purpose. Surely the applicant intended so in seeking declaratory relief in this forum when threatened with potential State enforcement action regarding its transportation services.[1]

However, the decision rendered in this case may well achieve the opposite result, and do a disservice to the parties and the importance of the issues they raise.

The record upon which the majority decision is predicated is woefully barren of any credible factual evidence

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[1] 5 USC Section 554(e); *Service Storage and Transfer Co. v. Virginia* 359 U.S. 171 1959; See also *Public Service Commission v. Wycoff,* 344 U.S. 237 (1952) Douglas J. dissenting.

concerning the essential characteristic of the transportation services at issue. Indeed, there is clearly contradictory evidence on material facts.[2]

The dispute here primarily concerns matters of fact, not law.[3] In fairness to proponents and opponents alike, an opportunity for a hearing to develop a hearing to develop an adequate, factual record would have been the proper course of action.[4] On the present record, to attempt declaratory conclusions regarding interstate commerce is unreasonable and arbitrary.

A decision so wanting in fact and tenuous in conclusion cannot be reasonably expected to stay the hand of the State. Rather, it will, no doubt, encourage the State to investigate and appropriately establish operative facts concerning the nature of the contested transportation.[5]

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[2] The majority concedes that "[i]n the final analysis, the issue here is one of credibility".

[3] Indicia of intent as here involved are critically and essentially matters of fact. See *Baltimore & O.S.W.R.R. v. Seattle*, 260 U.S. 166 (1922); *Armstrong, Inc. – Transportation Within Texas*, 2 ICC 2d 63 (1986).

[4] See 5 USC Sections 554(c), 556 and 557.

[5] Applicant and supporting shipper, without further explanation, repeatedly qualify their presentation by use of phrase "As pertinent to this petition". "Control" of transportation is asserted based on a representation that shipper "is causing to be shipped". The majority expressly notes that *credibility* is in issue, and observes that "if Matlack has not described the transportation at issue accurately, or if, in fact, it performs other service that differs significantly from that described, our findings will not apply to that transportation." Such statements render this decision essentially meaningless rather than merely advisory.

In short, this vaguely worded decision does little more than invite further State initiatives.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2043.

Middlewest Motor Freight Bureau, et al,	*	
Petitioners,	*	Petition for Review of an Order of the Interstate Commerce Commission.
vs.	*	
Interstatee (sic) Commerce Commission, et al,	*	
Respondents.	*	

No. 87-2419.

Steere Tank Lines, Inc.	*	
Petitioner,	*	Petitioner for Review of an Order of the Interstate Commerce Commission.
vs.	*	
Interstate Commerce Commission, et al,	*	
Respondents.	*	

The suggestion for rehearing en banc of Intervenors, Missouri Division of Transportation and Alabama Public Service Commission, has been considered by the Court and is denied by lack of majority of acting judges voting to rehear the case en banc.

Judge Frank Magill recused himself.

The petition for rehearing is also order denied.

April 10, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-10999

MATLACK, INC. – TRANSPORTATION WITHIN MISSOURI – PETITION FOR DECLARATORY ORDER

SERVICE DATE DEC. 31, 1987

Decided: December 16, 1987

In our prior decision, served June 17, 1987 (*June* decision), we found that certain, described transportation of chemicals within Missouri is part of a continuous interstate movement. Petitions to reopen have been filed jointly by Steere Tank Lines, Inc., Southern Gulf Trucking, Inc., and Great Western Trucking Co., Inc. (Steere, *et al.*), and jointly by Ward Transport, Inc., Groendyke Transport, Inc., and Petco, Inc. Interstate (Ward, *et al.*). The Missouri Division of Transportation (MDOT) has filed a petition (and an amended petition) to intervene and to reopen, or, in the alternative, to stay action pending request for judicial review.[1] The Alabama Public Service Commission has also filed a petition to reopen, adopting the arguments presented by the petitioning carriers iden-

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[1] Petitions for review of the June 1987 decision were filed in the United States Courts of Appeals for both the Fifth Circuit and Eighth Circuits. However on October 26, 1987 the Fifth Circuit granted a pending motion to transfer to the Eighth Circuit, where review apparently will proceed. Nos. 87-2043 and 87-2419, *Middlewest Motor Freight Bureau et al.*, v. *ICC*, and *United States*. MDOT has intervened in the court proceeding.

tified above, and Jarvis Leasing, Inc., The Maxwell Co., and Propane Transport, Inc., have jointly submitted a letter to the same effect. Matlack, Inc. (petitioner) and National-American Wholesale Grocers' Association (NAWGA) replied. Subsequently, the State of Texas (Texas) filed a petition to intervene and to consolidate this case with certain other declaratory order proceedings for purposes of dismissal, to which Matlack replied. The petitioners in those other proceedings – Armstrong World Industries, Inc., The Quaker Oats Company, and Victoria Terminal Enterprises, Inc. – have filed separate, but substantially similar, petitions to reject Texas' petition to intervene and to consolidate and, in the alternative, replies to that petition. Texas has replied to the Armstrong, Quaker Oats, and Victoria pleadings.

PROCEDURAL MATTERS

In our prior decision, we expressed some surprise that Missouri, the State in which the transportation under consideration takes place, had not participated. MDOT now states that it had been unaware of the pendency of this proceeding until it received a copy of our decision. It states that it became aware on July 31, 1986, that Matlack was filing a petition with us relating to transportation within Missouri, and wrote to the Commission, on August 4, 1986, requesting information about, and a copy of, the petition. (It submits a copy of the letter.) However, it neither received a response to this inquiry nor was placed on the service list to be advised of our actions in the case. It claims that this denied it an opportunity to participate in the development of the record. Accordingly, it requests that the proceeding be reopened and that it be

allowed adequate time for discovery. MDOT states that it is unable to specify more particularly the evidence it would expect to submit, due to the short time since receiving a copy of the decision. (We note that MDOT's amended petition, filed some 2½ months after its first petition, also is not specific on this point.) It argues that it is an indispensible party to any just adjudication in this case and that we did not have in personam jurisdiction over it, thereby depriving the Commission of jurisdiction to enter a declaratory order in this matter. It also argues that our prior decision is only an advisory opinion and thus is nonbinding and of no effect. Matlack does not object to allowing MDOT to intervene, but it does oppose the other relief requested.

Contrary to MDOT's claims, notice was entirely adequate here. Notice of institution of this proceeding was given to all interested parties by publication in the *Federal Register* and the *ICC Register*. This constitutes full constructive notice to the public, regardless of any other circumstances. We were not aware of MDOT's letter until it filed its petition to intervene, and our records do not reflect earlier receipt of this letter. Nevertheless, in view of MDOT's August 1986 letter and the fact that this case involves Missouri shipments, we will allow MDOT to intervene so that we can takes (sic) its views into account. We see no prejudice to any party resulting from our decision to consider all views presented at this point.

MDOT's alternative request for a stay pending judicial review is denied. A stay would serve no useful purpose. The consequences of the "effectiveness" of a declaratory order are technical only, inasmuch as we have

ordered no action and imposed no sanctions with respect to anyone involved in the subject transportation.

Because we have decided to issue a subsequent decision in this proceeding, we also will grant the (untimely) petition of Texas to intervene so that we can consider its arguments. However, we will not broaden the issues in this case. Texas states that it has sought intervention here to protect its interests as a party in *Armstrong, Inc. – Transportation within Texas*, 2 I.C.C.2d 63 (1986) (*Armstrong*).[2] But the facts of *Armstrong* have no relevance to the nature of Matlack's transportation services within Missouri.[3]

We deny Texas' request for consolidation of this proceeding with any other recent declaratory order proceedings involving the question whether particular traffic (different from the traffic at issue here) is in interstate or intrastate commerce. The cases that Texas seeks to have consolidated all involve different commodities, different shippers and different routes. Each case should be

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[2] Petitions to reopen *Armstrong* were denied on August 25, 1987. A petition for review of *Armstrong* is pending in *Texas v. ICC*, U.S.C.A., 5th Cir. No. 87-4725 (pet. for review filed Oct. 14, 1987).

[3] We have considered Texas' argument that there may be a conflict of interest because the attorney arguing for the rate bureaus here that this transportation is *intrastate* allegedly represented Reeves, a party aligned with Armstrong in the *Armstrong* proceeding, arguing for *interstate* treatment. We see no conflict of interest here because the determination of whether particular transportation is interstate or intrastate depends on the facts of each case. Moreover, the petitioning parties in this proceeding and in *Armstrong* are represented by different counsel.

decided on its own facts. *See* Ex Parte No. MC-182, *United States Department of Transportation – Petition for Rulemaking – Single State Transportation in Interstate or Foreign Commerce* (not printed), slip opinion served February 12, 1987, at 6.[4]

We discuss below MDOT's discovery request and jurisdictional claims and Texas' argument that this proceeding should be dismissed because we lack jurisdiction to resolve the issues.

DISCUSSION AND CONCLUSIONS

The petitions to reopen will be denied. There is no showing that our prior action would be affected materially because of new evidence or changed circumstances, or that it involves material error.

The petitions to reopen largely repeat arguments previously made and fully considered and discussed in our prior decision. The principal claim is that the factual record is inadequate to support our conclusions. To this end, requests for discovery (including the taking of a deposition) and cross-examination are renewed.

We reaffirm our prior denial of the requests for discovery and oral hearing. *See June* decision at 2. As we stated there, this is a declaratory order, not an adversary proceeding. The taking of depositions is neither contemplated nor required, and there is no need for discovery or

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[4] We note that consolidation would be inappropriate in any event because these various proceedings are not at similar procedural stages susceptible to consolidation.

oral hearing in this kind of case because there is no fact finding involved. The purpose of a declaratory order is simply to remove uncertainty as to the legal effect of the fact pattern presented by the party requesting the declaration. It is not a verification of those "facts," nor does it apply to any different circumstances (which may or may not differ materially for purposes of the legal analysis involved).

This proceeding involves neither an application[5] nor a complaint, and it makes no final determination as to any specific rights of any party.[6] It is simply our inter-

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[5] Those requesting an evidentiary hearing or discovery principally rely on *Funbus Systems Inc.* v. *State of California*, 801 F.2d 1120 (9th Cir. 1986); *Cross-Sound Ferry Services, Inc.* v. *ICC*, 738 F.2d 481 (D.C. Cir. 1984) and *Steere Tank Lines* v. *ICC*, 736 F.2d 1094 (5th Cir. 1984). Those cases are inapposite. Each involved an application for operating authority. The question whether the transportation at issue was intrastate or interstate was not before the agency.

[6] The "case or controversy" limitations on judicial power do not limit the powers of administrative agencies in declaratory order proceedings. No. MC-C-30006, *The Quaker Oats Company – Transportation within Texas and California – Petition for Declaratory Order* (not printed), served August 26, 1987 (*Quaker Oats*).

A federal district court cannot enter an advisory opinion. That is a necessary consequence of the "case or controversy" limitations upon its jurisdiction. U.S. Constitution, Article III. But our power is not so limited. *See* 5 U.S.C 554(d); *Illinois Terminal R. R.* v. *ICC*, 671 F.2d 1214, 1216 (8th Cir. 1982) (The Commission is authorized to issue declaratory orders to remove uncertainties about terms of art within its special expertise); *Climax Molybdenum Co.* v. *Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983); *Tennessee Gas Pipeline Co.* v. *FPC*, 606 F.2d 1373, 1379 (D.C. Cir. 1979).

pretation of the applicable law as it affects a given set of facts within our primary jurisdiction. It does not preclude State authorities (or any other interested parties) from filing a complaint with us to demonstrate a different set of facts and argue for a different legal conclusion based on those facts.

While this is an adjudicatory proceeding within the meaning of 5 U.S.C. 551(7),[7] it does not follow that a formal hearing is required. The provisions of 5 U.S.C. 554 in general are made applicable only to those cases of adjudication that are "required by statute to be determined on the record after opportunity for an agency hearing[.]" 5 U.S.C. 544(a). No statutory provision requires such a formal hearing process in a declaratory order proceeding such as this, and it is clear that section 544(a) itself does not impose a blanket hearing requirement on all adjudications.

Here, interested parties (including MDOT) have had an adequate opportunity to make their views known. We note that MDOT's amended petition does not repeat its request for discovery but only makes legal arguments why this proceeding should be dismissed. In these circumstances, there is clearly no need to permit MDOT a further opportunity to file evidence.

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[7] Adjudication is defined as the "agency process for the formulation of an order" (5 U.S.C. 551(7)); an order, in turn, is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" (5 U.S.C. 551(6)).

We reject the challenges of Texas, MDOT and Steere, *et al.*, to our jurisdiction to consider this case. We were asked to determine whether certain described transportation services, conducted by petitioner within a single State, are embraced within an ICC-issued contract carrier permit authorizing transportation in interstate or foreign commerce. Thus, this proceeding calls for an interpretation of the scope of operating authority we have issued. It is settled law that we have primary jurisdiction over the interpretation of federal motor carrier certificates. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 177 (1959) (*Service Storage*); *Gray Lines Tours Co. of Southern Nevada* v. *ICC*, 824 F.2d 811, 815 (9th Cir. 1987). *Accord Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959); *Merchants Fast Motor Lines, Inc.* v. *ICC*, 528 F.2d 1042, 1044-45 (5th Cir. 1976). This reflects the underlying fact that "[t]he structuring and interpretation of a certificate of public convenience and necessity is an exercise of the Commission's special expertise." *R-C Motor Lines, Inc.* v. *United States*, 350 F. Supp. 1169, 1171 (M.D. Fla. 1972) (3 judge court), *aff'd mem.*, 411 U.S. 941 (1973). Judicial review of our determination is available in the courts of appeals. 28 U.S.C. 2342 *et. seq.*[8]

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[8] Texas claims that ICC declaratory orders are advisory and have no legal consequences, and that therefore determining the nature of particular traffic is a question for the courts in the first instance, not the ICC. However, declaratory order proceedings are "advisory" only in the sense that they do not make factual findings, but make legal conclusions (interpreting authority) based on the facts alleged and that if different facts were presented the Commission might rule differently. A

(Continued on following page)

In our prior decision we concluded that, in the situation described by Matlack, the involved shipments originate out of State. Thus, there is transportation of the commodities "between a place in a State and a place in another State" (*see* 49 U.S.C. 10521(a)(1)(A)). *See Armstrong*, 2 I.C.C.2d at 69; *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111, 122 (1913); *Baltimore & O.S.W.R.R.* v. *Settle*, 260 U.S. 166 (1922). We concluded that these commodities do not "come to rest" at shipper Chemtech's storage facilities.[9] Rather, the interstate transportation does not come to an end before petitioner transports the goods to customer destinations within Missouri. Conse-

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(Continued from previous page)

declaratory order by the Commission is the proper vehicle for interpreting federally issued certificates. *See, e.g., Service Storage*, 359 U.S. at 177-78. A party receiving an "adverse" declaratory ruling "may obtain review" in the appropriate court. *First Savings Loan Ass'n* v. *SEC*, 358 F.2d 359, 360 (5th Cir. 1966). However, it is for the Commission, not a court, to determine the nature of particular traffic in the first instance.

[9] As we observed in the *June* decision at 4, the bulk liquid chemicals rarely remain at the shipper's facilities for more than 30 days prior to reshipment. The particular length of time goods are stored does not itself determine whether they have "come to rest" at the shipper's facilities. What is important is whether the time the commodities are held in temporary storage is substantially longer than would ordinarily be necessary to accomplish the transfer from the large-volume inbound shipments to the smaller-volume outbound shipments for delivery to customers. *See Quaker Oats*, slip opinion at 10-11. Here, no processing takes place at Chemtech's facilities and the chemicals move expeditiously to their ultimate destination. Thus, these shipments do not "come to rest" at the distribution facilities.

quently, Matlack's participation is only a portion of the interstate transportation of these commodities. This determination clearly is within our primary jurisdiction.

We reaffirm our finding that the involved movements are in interstate commerce. This case is quite similar to *North Carolina Utilities Commission* v. *United States*, 253 F.Supp. 930 (E.D. N.C. 1966) (3-judge court) (*North Carolina*). In that case a shipper in North Carolina ordered nails from overseas producers to supply its eight stores located in several inland cities in North Carolina. The shipper had inventoried the needs of its inland stores and placed the order based on their aggregate needs. Six months later the goods arrived at Wilmington, from where they were soon shipped inland "pursuant to a rapid re-examination of their individual needs." 253 F. Supp. at 936. As here, the shipper did not control the inbound movements to North Carolina. To the contrary, "[t]he foreign producer shipp[ed] the goods by ocean bill of lading to its own order at the port of Wilmington." 253 F. Supp. at 933. Based on the evidence described above the court found (*id.* at 936) that the "obvious and dominant intent of [the shipper was] to obtain goods from Belgium destined for delivery at its eight inland stores in North Carolina for sale to the public." The docks at Wilmington were not the intended destination, "but a mere link in the chain of foreign commerce."

The reasoning and conclusions of *North Carolina* are equally compelling here. The movements at issue all originate out of State. Chemtech's distribution facilities are not intended to be the ultimate destination. Chemtech purchases chemicals based on customer contracts entered into prior to shipment and projections of the demands of

known customers. Thus, shipments to Chemtech's facilities are based on projections of the need for chemicals of the individual customers which the company supplies. The goods remain in storage at Chemtech's facilities only temporarily and move on to their destinations in a prompt and expeditious manner. In short, Chemtech's intent that the chemicals move to its customers is clearly formed at the time the chemicals are initially shipped. Accordingly, the chemicals do not come to rest at Chemtech's facilities. Rather, these shipments, like those at issue in *North Carolina*, constitute continuous movements in interstate commerce.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions of MDOT (as amended) and the State of Texas to intervene are granted. The petitions of Armstrong World Industries, Inc., The Quaker Oats Company, and Victoria Terminal Enterprises, Inc., to reject those petitions accordingly are denied.

2. The petitions to reopen, or in the alternative to stay action, are denied.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioner Sterrett, Andre, and Simmons. Vice Chairman Lamboley and Commissioner Simmons dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

VICE CHAIRMAN LAMBOLEY, dissenting:

As I stated previously,[1] the record upon which the finding of interstate commerce is made is devoid of credible factual evidence, especially concerning the manner and control of the bulk chemical movements to Chemtech's St. Louis distribution facility. The petitions to reopen merely confirm the need to develop an adequate factual record.

COMMISSIONER SIMMONS, dissenting:

By affirming the June decision in this proceeding, the majority continues to ignore basic deficiencies in the factual record. In my view, these deficiencies preclude any possibility of arriving at a reasoned or defensible resolution of the intrastate-interstate issue presented. The majority's apparent lack of concern over how and under whose control the commodities move from out-of-State points of origin to the St. Louis distribution terminal is particularly puzzling. These factors are crucial to any understanding of the factual situation which the Commission has been asked to interpret. For further discussion of

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[1] See my dissenting expression MC-C-10999 *Matlack Inc. Transportation Within Missouri – Petition for Declaratory Order,* (not printed) served June 17, 1987.

these matters, please see the separate dissenting expressions to the June 17, 1987, decision in this proceeding and to the decision in No. MC-C-30002, *Victoria Terminal Enterprises, Inc. – Transportation of Fertilizer Within Texas – Petition for Declaratory Order* (not printed), served December 15, 1987.

Because of the uncertainty surrounding the factual record, I believe this proceeding should have been set for oral argument before the entire Commission. The majority stated in June that "in the final analysis, the issue here is one of credibility." Oral argument is especially suited for resolving factual questions and assessing witness credibility. Given the unusual interest of three States in the proceeding, oral argument would have encouraged cooperation with State officials on transportation matters, one of the directives included in the national transportation policy at 49 U.S.C. 10101. Since no oral arguments or voting conferences have yet been scheduled for 1988, oral argument in this proceeding would also have met our obligation to conduct "government in the sunshine."

In two separate memoranda dated December 11 and December 14, 1987, I requested that the Chairman schedule oral argument in the case. Although a draft decision had already been circulated by the Office of Proceedings, oral argument has been set in other cases under similar circumstances. A majority of the Commission had not yet voted on the draft decision, and there was no statutory deadline for issuance of a decision on appeal. Finally, no parties would have been prejudiced by a short delay to accommodate oral argument. Interested persons should draw their own conclusions from the Chairman's refusal

to schedule oral argument and from her refusal even to respond to this request in a formal memorandum.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2043

Middlewest Motor Freight Bureau, National Motor Freight Traffic Association, Inc., New York Motor Carrier Conference, Central States Motor Freight Bureau, Inc., Eastern-Central Motor Carriers Association, Inc., Central & Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Niagara Frontier Tariff Bureau, Inc., Pacific Inland Tariff Bureau, New England Motor Rate Bureau, Inc., Southern Motor Carriers Rate Conference,	*	On Petition for Review of an Order of Interstate Commerce Commission.
Petitioners,	*	
v.	*	
Interstate Commerce Commission and United States of America,	*	
Respondents.	*	

No. 87-2419

Steere Tank Lines, Inc., *
Petitioner, *
v. *
Interstate Commerce Commission and United States of America, *
Respondents. *

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the ICC had jurisdiction to decide this case and that the decision of the ICC is affirmed in accordance with the opinion of this Court.

February 3, 1989

A True Copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.
MANDATE ISSUED: 4/19/89

Before the
INTERSTATE COMMERCE COMMISSION

Docket No. MC-C-10999

Matlack, Inc., Petition for Declaratory Order
(Transportation Within Missouri)

VERIFIED STATEMENT OF A. GAIL COBB

My name is A. Gail Cobb and I am Director of Traffic of Chemtech Industries, Inc. I am also a registered practitioner before the Commission. I am aware of the facts and circumstances which led to the filing of this petition for declaratory order and I am authorized by Chemtech Industries to submit this statement in support of the position of Matlack, Inc.

Chemtech Industries, Inc. (hereinafter referred to as Chemtech) is a manufacturer and distributor of chemicals and related commodities with sales in both the domestic and international markets. As pertinent to this petition for declaratory order, Chemtech owns and operates distribution facilities at Kansas City, Missouri, St. Louis, Missouri, and Springfield, Missouri. All products shipped from these three Missouri locations are first shipped to such locations from origin points located outside of the state of Missouri. All of the bulk commodities transported to and then from Chemtech's cited distribution facilities are purchased from other companies engaged in the manufacture of such products. A product list provided by Chemtech is attached as *Appendix A*.

Transportation services employed with regard to the shipment of these commodities to the distribution facilities from origins outside of Missouri include for-hire barge transportation, common and contract motor carrier transportation and rail transportation. As pertinent to this petition, shipments transported inbound to the three distribution facilities are received in bulk form, and are reshipped in that same form. The same commodities are received at these distribution facilities at various times, via various modes and in various quantities. For example, the Chemtech distribution facility at St. Louis will receive shipments of toluene in bargeload quantities of 400,000 gallons from one or more manufacturer, rail tank car quantities of from 20,000 to 30,000 gallons from another manufacturer, and tank truck quantities of approximately 6,500 gallons from yet another company. The amount of time commodities remain at the distribution facilities of Chemtech before further transportation to ultimate consignees varies, but almost never exceeds 30 days with respect to commodities received in bulk and to be shipped outbound in bulk. The transportation from the distribution facilities to ultimate customers is performed by common and contract motor carriers and by rail carriers. None of the products received at the distribution facilities of Chemtech and as pertinent to this petition are used or consumed by Chemtech, and as pertinent to outbound bulk transportation, products are shipped outbound from the distribution facility in the same form as they are received at the distribution facility. There is no manufacturing process applied to these products at these facilities and with respect to the commodities transported by Matlack.

Chemtech's reasons for locating and maintaining the distribution facilities at the three cited Missouri locations are varied, but in the case of Kansas City and St. Louis a principal reason was to allow a transfer of the commodity from bulk barge and rail transportation to motor carrier or rail transportation, and to provide the necessary storage facility so as to convert, as an example, the 400,000 gallon barge shipments into the smaller units of volume required for rail and motor carrier transportation outbound from the distribution facilities. The Springfield facility is located at such point for a similar reason, but so as to better effect the transition from large volume rail shipments to the smaller units of volume required for subsequent motor carrier transportation.

Importantly, 70% to 80% of the volume of bulk products received at the named distribution facilities is subject to supply contracts and similar sales arrangements between Chemtech and its customers located in Missouri, with such contracts and agreements reached in advance of the product shipment from the out of state origin to the Missouri distribution facilities. That is to say, for this volume, Chemtech is causing to be shipped to its distribution facilities volumes of particular commodities in order to fulfill contractual arrangements with customers entered into in advance. The balance of the volume as pertinent to the outbound bulk transportation provided by Matlack is purchased and caused to be shipped by Chemtech to its distribution facilities to fill requirements of known customers based upon past ordering practices of those customers, though no formal sales contract might exist at the time the product commences its out of state

journey destined for the distribution facilities of Chemtech.

Prior to the spring of 1986, much of this transportation service from the distribution facilities to Missouri destinations was performed by Chemtech in private carriage. Commencing with June 1, 1986, Matlack, pursuant to its Sub-No. 1355 contract carrier permit, and the bilateral contract it had entered into with Chemtech, commenced to supplant Chemtech's private carriage for this within-Missouri service as well as service involving destination points outside of Missouri.

/s/ A. Gail Cobb
A. Gail Cobb
Director of Traffic
Chemtech Industries, Inc.
Registered Practitioner

State of Missouri)
)
County of Des Peres)

VERIFICATION

A. Gail Cobb, being duly sworn, states that he has read the foregoing statement, and that the contents thereof are true and correct to the best of his knowledge and belief.

/s/ A. Gail Cobb
A. Gail Cobb

Subscribed and sworn to before me, a notary public, this 17th day of November, 1986.

/s/ Lisa M. Moehrle
Notary Public

My Commission expires: June 1, 1990.

LISA M. MOEHRLE, NOTARY PUBLIC, St. Louis County, State of Missouri. My Commission Expires June 1, 1990

AMENDMENT 5

No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .

UNITED STATES CONSTITUTION, AMENDMENT 5.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearings;

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[1] So in original.

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

* * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

5 U.S.C. § 554 (1982).

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. § 556 (1982).

* * *

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1982).

§ 10306. Conduct of proceedings

* * *

(c) The Commission shall conform its forms for giving notice and their manner of service, to the extent practical, to those used by the courts of the United States.

49 U.S.C. § 10306(c) (1982).

* * *

§ 10328. Intervention

* * *

(b)(1) Under regulations of the Interstate Commerce Commission, reasonable notice of, and an opportunity to intervene and participate in, a proceeding under this subtitle related to transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title shall be given to interested persons.

(2) The Commission may adopt, after a rulemaking proceeding in accordance with the provisions of section 553 of title 5, a special procedure for providing interested parties reasonable notice of applications to provide transportation as a motor or water common or contract carrier or freight forwarder, or to be a broker for transportation, under sections 10922, 10923, 10924, and 10928 of this title, or applications for removal of operating restrictions under section 10922 of this title. The special procedure may consist of printing and distributing to subscribers an independent publication to provide notice of such applications, if the Commission finds, as a result of its rulemaking proceedings, that such method of providing notice would not be unduly burdensome to the public.

49 U.S.C. § 10328(b) (1982).

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation, except by a freight forwarder (other than a household goods freight forwarder), to the extent that passengers, property, or both, are transported by motor carrier –

(1) between a place in –

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not –

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

49 U.S.C. § 10521 (1982 & Supp. 1987)

Supreme Court, U.S.
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CLERK

No. 89-53

IN THE

Supreme Court of the United States

October Term, 1989

MISSOURI DIVISION OF TRANSPORTATION,
ALABAMA PUBLIC SERVICE COMMISSION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-53

MISSOURI DIVISION OF TRANSPORTATION,
ALABAMA PUBLIC SERVICE COMMISSION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES, et al.
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to U.S. Sup. Ct. Rule 19.6, the National Association of Regulatory Utility Commissioners (NARUC), intervenor in the proceeding below, hereby responds in support of the petition of the Missouri Division of Transportation and the Alabama Public Service Commission for a writ of certiorari to the United States Court of Appeals for the Eighth

Circuit.

OPINION BELOW

The opinion of the Court of Appeals, entitled Middlewest Motor Freight Bureau et al. v. Interstate Commerce Commission et al., (Pet. App. 1-9) is reported at 867 F.2d 458 (8th Cir. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1989. A petition for rehearing and rehearing en banc was denied on April 10, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 2350(a) and 28 U.S.C. 1254(1).

STATEMENT

Chemtech Industries, Inc. purchases chemicals in bulk from sellers outside the State of Missouri for delivery to its distribution facility in St. Louis. In June 1986, Chemtech began to use Matlack, Inc.,

a contract carrier operating in interstate commerce pursuant to operating rights granted by the Interstate Commerce Commission (ICC or the Commission), to transport its chemicals from the St. Louis facility to final delivery points within the State of Missouri. Shortly thereafter, the State of Missouri commenced enforcement proceedings against Matlack on the ground that the carrier, who possessed no authority from the State to provide intrastate motor carrier service, was operating unlawfully to the extent that it provided carriage from St. Louis to other points wholly within the State.

In July 1986, Matlack filed a petition for a declaratory order with the ICC requesting a ruling that the transportation services it provided Chemtech within the State of Missouri were in interstate commerce and therefore authorized by its interstate operating rights. By decision served June

17, 1987 (Pet. App. 10-25) and reaffirmed on rehearing by decision served December 31, 1987 (Pet. App. at 27-40), the Commission, by a vote of 3-2, granted Matlack's petition. Finding that the service Matlack provided in Missouri was "part of a continuous interstate movement" (Pet. App. at 22), the ICC ruled that the State of Missouri, through its Division of Transportation, was without jurisdiction to regulate the service.[1] Moreover, the Commission determined that because transportation of the chemicals into the St. Louis facility was exempt from its regulatory authority, "Federal jurisdiction over continuing outbound movements does not attach" to shipment to Missouri points. (Pet. App. at 22).

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[1] The Missouri Division of Transportation (MDOT), one of the Petitioners herein, is a member agency of the NARUC, as is the Alabama Public Service Commission (APSC), the other Petitioner.

In reaching its decision, the Commission relied heavily, if not exclusively, on its finding that Chemtech "intended for its shipments to be in interstate commerce." (Pet. App. at 17-21). In so doing, the ICC rejected claims based on this Court's decision in Atlantic Coast Line R.R. v. Standard Oil Co. of Kentucky, 275 U.S. 257, 269 (1927), that once the bulk chemicals were delivered to the St. Louis facility, the character of the commerce at issue changed from interstate to intrastate. (Pet. App. at 18-19).

On review, the U.S. Court of Appeals for the Eighth Circuit affirmed the Commission's declaratory ruling. (Pet. App. at 1-9).[2] Relying on Service Storage & Transfer Co. v. Virginia, 359 U.S. 171 (1959), the Court below rejected claims that the ICC was

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[2] As noted supra at 1, the NARUC was a party intervenor in the Eighth Circuit litigation. See Pet. at ii.

without jurisdiction to declare that the MDOT's authority to regulate Matlack's Missouri transportation services was preempted. (Pet. App. at 4-5). On the merits, the Court affirmed the ICC's finding that the Missouri transportation provided by Matlack was interstate in character. Applying the "narrow standard" of judicial review found in the Administrative Procedures Act (5 U.S.C. 706 (2)(A),(E)), the Court held that "we cannot say that the ICC's finding that the essential character of the shipment is interstate commerce is arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence on the record as a whole." In reaching this conclusion, the Court accepted the ICC's view that Atlantic Coast Line, supra, was distinguishable on the issue of shipper intent. (Pet. App. at 6-8).[3] Rehearing and

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[3] As Petitioners correctly note, the Eighth Circuit's opinion failed to address several procedural and substantive issues

rehearing en banc were subsequently denied. (Pet. App. at 26-27).

REASONS FOR GRANTING THE WRIT

This Case Raises Important Issues of Federal Law Which Are of Broad National Significance

1. The decision under review by the Eighth Circuit is the first of many recent ICC decisions concerning the "character of commerce" to reach this Court. Indeed, it is now quite clear that in 1986, a majority of the Commission began a campaign to reclassify intrastate transportation as interstate commerce in order to preempt State

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raised by the parties below: that the Commission had failed to provide adequate notice of its declaratory proceeding, that the ICC's refusal to permit discovery, factfinding and a hearing violated the parties' rights to due process, and that the case should be analysed as a matter of Federal preemption of State authority to regulate intrastate activities. Pet. at 10.

regulation on a case-by-case basis.[4] The Commission's Armstrong decision (see n. 4, infra) was the first "declaration" that sought to preempt State motor carrier regulatory authority, but far from the last.[5]

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[4] State of Texas v. United States, 866 F.2d 1546 (5th Cir. 1989). The Court of Appeals upheld an ICC decision entitled Armstrong, Inc.--Transportation within Texas, 2 I.C.C. 63 (1986) which declared that the intrastate shipment of nonsidemarked carpet from Arlington, Texas to other Texas points was interstate commerce, and therefore beyond the jurisdiction of the State, due to the "fixed and persisting intent" of the shipper. See also, State of Texas v. United States, 837 F.2d 184 (5th Cir. 1988), cert.denied, ___ U.S. __, 102 L.Ed.2d 42 (1988), in which the Fifth Circuit denied the ICC's request for a preliminary injunction against State prosecution of an enforcement action against transportation of the carpet by an interstate carrier.

[5] See Quaker Oats Co., No. MC-C-30006 (ICC August 26, 1987), appl. pending sub nom. California Trucking Ass'n v. Interstate Commerce Commission, 9th Cir. No. 87-4739 (ICC declaration that shipments of manufactured products from warehouses within the States of California and Texas to other points in those States constituted interstate commerce beyond State regulation, in reliance on "shipper intent"); Victoria Terminal Enterprises, Inc., No. MC-C-30002 (ICC December 15, 1987 and April 29, 1987), appl. pending sub nom. Steere Tank Lines, Inc. v.

Indeed, as the Petitioners note, there remain petitions for declaratory orders pending before the ICC today which, if granted, would result in further Commission declarations that the intrastate movement of goods is beyond State jurisdiction. (Pet. at 16-17). As the Petitioners further note, the Commission has yet to "declare" in any of these cases that the transportation at issue is intrastate in character; the only petitions it has dismissed have failed on procedural grounds. Id.

These cases have fallen into a

Interstate Commerce Commission, 5th Cir. No. 88-4001, (ICC declaration that intrastate shipment of bulk fertilizer from terminals in Texas to other Texas points was interstate commerce--despite prior interstate shipment by exempt barge to terminals--due to shipper intent); Bigbee Transportation, Inc., No. MC-C-30065 (ICC declaration of interstate commerce); James River Corp. No. MC-C-30044 (same). See also, United States Department of Transportation--Petition for Rulemaking, Ex Parte No. MC-182 (1986) (ICC denial of U.S. Department of Transportation petition to commence rulemaking proceeding to resolve "nature of commerce" issues in favor of case-by-case adjudication).

predictable pattern: a shipper or interstate motor carrier files a petition with the Commission under the declaratory order provisions of the Administrative Procedures Act, 5 U.S.C. 554, seeking an ICC ruling that the movement of goods from outside the borders of a State through a warehouse, tank farm, or other distribution facility, and then to instate receivers is entirely interstate in nature, and that therefore, the intrastate leg of the movement is beyond State regulatory authority. Invariably, the petitioner bases its claim on the "fixed and persisting intent" of the shipper to transport its goods in interstate commerce.

In response to a petition, the Commission publishes a brief notice in the ICC Register and the Federal Register indicating that it will accept comments on the petition; however, the Commission always denies requests for discovery or a hearing on the record with cross examination of

witnesses. Instead, as in this case, the Commission finds the proceeding to be "a declaratory order, not an adversary, proceeding", suitable for decision "on the basis of written statements." (Pet. App. at 12). Then, inevitably, the Commission issues its ruling finding that the intrastate transportation at issue is "interstate commerce" based upon "shipper intent." (Pet. App. at 17).

As a result, this case cannot be viewed as an isolated example of a routine administrative ruling limited to motor carrier service provided by one carrier to one shipper; rather, the Commission "declaration" affirmed by the Eighth Circuit is but the first of a broad, national pattern of administrative decisions resulting in the wholesale removal of State authority to regulate intrastate commerce. As such, the case is worthy of this Court's attention, particularly given the important issue of

Federal preemption raised by the Commission's actions, to which we now turn.

2. There can be little doubt that the result, if not the purpose, of the ICC's Matlack proceeding is the preemption of the State of Missouri's authority to regulate the intrastate motor carrier transportation at issue. That the ICC chose to preempt Missouri through a declaratory order issued without benefit of fact finding does not diminish the fact that here, as elsewhere[6], the Commission has found that transportation between points within a State is beyond the authority of the State's regulatory agencies. Yet despite briefing on the issue, the Court of Appeals failed to apply preemption analysis to the Commission's decision. (Pet. App. at 6-8).

The threshold question presented by the ICC's decision is whether Congress granted

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[6] See supra, at fn.4,5.

the Commission the authority to preempt, through declaratory order or otherwise, State regulation of motor carriage which is on its face intrastate in nature. In other words, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede State law". Louisiana Public Service Commission v. FCC, 476 U.S. 355, 369 (1986).[7]

In 49 U.S.C. Sec. 10521(b) (Supp. 1987), Congress specifically denied the Commission the authority "to affect the power of a State to regulate intrastate transportation provided by a motor carrier." Under section 10521(a) (Supp. 1987), the ICC's jurisdiction extends only to motor carrier operations between, inter alia, "a place in a State and a place in another State." Therefore, it is

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[7] In its decision, the ICC did not displace State law with Federal law; it preempted Missouri's regulatory authority and substituted no regulation at all. (Pet. App. at 22).

clear from the face of the statute that Congress has created a dual system of motor carrier regulation in which transportation across State lines is regulated by the ICC and transportation within a State is regulated by State authorities.[8]

A similar dual regulatory scheme was under review in this Court's decision in Louisiana, supra. There, the Court held that the Federal Communications Commission (FCC) had no jurisdiction to regulate the depreciation schedules for equipment of telephone utilities used to provide intrastate service. The Court found that through the enactment of 47 U.S.C. sec. 152(b), the Congress had specifically denied the FCC the ability to preempt State regulation of depreciation schedules. 476 U.S. at 371-5. Therefore, the FCC's attempt

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[8] Of course, there is no question that the transportation at issue in this case occurs entirely within the State of Missouri. (Pet. App. at 2).

to preempt State authority was rejected because "a federal agency may pre-empt State law only when and if it is acting within the scope of its congressionally delegated authority." Id. The Court further stated that a federal agency "may not confer upon itself power" to preempt State jurisdiction where Congress has expressly limited the agency's jurisdiction even if the agency believes preemption is necessary to "effectuate a federal policy." Id.

The Court's holding in Louisiana applies with particular force to the action of the ICC here under review; yet the Court of Appeals' opinion ignores this or any decision addressing the preemptive power of Federal agencies. However, just as 47 U.S.C. sec. 152(b) denies the FCC authority to regulate "intrastate communication service by wire", 49 U.S.C. sec. 10521(b) denies the ICC the authority to "affect the power of a State to regulate intrastate transportation provided

by a motor carrier." Both Congressional denials are stated in quite categorical terms; neither provides any exceptions to the specific rule of nonpreemption.

Therefore, while the ICC has undoubted jurisdiction to issue declaratory rulings under 5 U.S.C. sec. 554(e), and while the ICC has primary jurisdiction to interpret federal motor carrier licenses,[9] the Court of Appeals made no finding that Congress intended the Commission to use these powers to preempt State regulatory authority in the teeth of a statute, section 10521(b), which expressly precludes Federal actions which "affect" State regulation. As this Court has stated, an agency such as the ICC has no power to preempt State authority if, as here, Congress has denied it such authority.[10]

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[9] Service Storage & Transfer Co. v. Virginia, 359 U.S. 171, 173 (1959).

[10] The Commission's lack of authority to sanction Matlack's intrastate service does not mean the carrier is forever precluded from transporting Chemtech's goods. Rather,

Louisiana, supra, is not the only recent decision in which this Court has rejected Federal preemption of State regulation of carriers and utilities. In Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985), the Court held that State decisions to accept collective intrastate motor carrier rate proposals do not violate federal antitrust laws in the absence of Congress' explicit intention to limit State regulation of intrastate commerce. In Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, 461 U.S. 374 (1983), the Court ruled that State regulation of rural electric generating and transmission cooperatives was not implicitly preempted by Federal loan requirements for REA borrowers. In Pacific Gas and Electric

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the carrier need but obtain intrastate operating authority from the State of Missouri enabling it to provide intrastate service. See Pet. at 4, n. 1, noting that Matlack now holds intrastate operating authority obtained from the MDOT.

Company v. State Energy Resource Conservation and Development Commission, 461 U.S. 190 (1983), a State moratorium on new nuclear power plant construction was upheld against claims of preemption grounded on Federal regulation of nuclear plant safety.[11] These cases document the Court's general reluctance to uphold claims of preemption where Congress has not explicitly ordained such preemption, or where, as in this case, Congress has explicitly denied preemptive authority.

The ICC's attempt to preempt Missouri's authority to regulate intrastate motor carriage raises similar principles of federalism reflected in these decisions. Given the broad national importance of this issue, this Court should review the actions

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[11] But see, Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. ___, 101 L.Ed.2d 322 (1988) (State regulation of the prudence of power purchases within a holding company system preempted by Federal regulation of the sale); See also Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

of an agency which seeks to preempt State motor carrier regulation by issuing declaratory rulings in fact-specific cases without benefit of fact finding.

The Court of Appeals' Opinion Conflicts With This Court's Opinion in Atlantic Coast Line Railroad

In 1927, this Court considered facts remarkably similar to those alleged in this case and found that the transportation of bulk commodities from in-State storage and distribution facilities to points within the State of Florida constituted intrastate commerce subject to the ratemaking jurisdiction of the State regulatory commission. Atlantic Coast Line Railroad Co. v. Standard Oil Company of Kentucky, 275 U.S. 257 (1927) (Atlantic Coast Lines).[12] In its

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[12] Atlantic Coast Lines is instructive for an additional reason: there the Court devoted great time and attention to the factual background of the transportation at issue, in sharp contrast to the ICC's refusal

preemptive decision, the ICC appears to accept the basic similarities between the facts in Atlantic Coast Lines and those in its Matlack ruling, finding only one determinative difference: according to the Commission, in Atlantic Coast Lines, "there was no intention at the time of the initial movement of the petroleum products involved that they be destined beyond the storage facilities." Pet. App. at 18. By contrast, according to the Commission, Chemtech, the intrastate shipper of chemicals in this case, intends its chemicals to end their journey at its customers' plants. Id. The difference in "intent" is the sole factor the ICC offered to distinguish its finding of interstate commerce in Matlack from the Supreme Court's intrastate finding in Atlantic Coast Lines. Id. On review, the

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to allow factfinding or a hearing. Compare Atlantic Coast Lines, 275 U.S. at 262-8 with Pet. App. at 11-12.

Eighth Circuit squarely affirmed this reasoning. (Pet. App. at 8).

The Commission's interpretation of Atlantic Coast Lines is wrong. It badly misconstrued this Court's opinion in order to reach the result--preemption of State jurisdiction--it sought. For at least the following reasons, this Court should review the Court of Appeals' affirmance of the Commission's characterization of Atlantic Coast Lines.

First, contrary to the ICC's reading of the case, this Court did not "emphasize" intent as a controlling or dispositive factor in its analysis of intrastate transportation of petroleum in Florida. Rather, the ICC emphasized this factor to the exclusion of any discussion of the striking similarities between the transportation before it and the transportation at issue in Atlantic Coast Lines. Pet. App. at 18-19. In so doing, the ICC ignored the Court's admonition "that the

determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it." 275 U.S. at 268-269. As Petitioners recount (Pet. at 25-6), there are many similarities and few, if any, differences between the commerce at issue in Atlantic Coast Lines and the commerce at issue in this case. By focussing upon one purported difference, the Commission has clearly failed the test set for it by this Court.

Second, and more importantly, the ICC misconstrued the one purported difference between Atlantic Coast Lines and its Matlack decision that it was able to find. The Commission asserts that in Atlantic Coast Lines, the Court found "no intention" to move bulk products interstate, while Chemtech evidences such intent. Pet. App. at 19. Indeed, in its decision, the ICC underscored the language from Atlantic Coast Lines purporting to show this absence of "intent",

which in turn determined the outcome of the Commission's analysis of the character of the intrastate movement at issue. Id.

The underscored language from Atlantic Coast Lines, however, does not support the Commission's effort to distinguish that case from the Missouri situation under consideration in this case. In Atlantic Coast Lines, as one of the many factors under consideration, the Court included the fact that there was no evidence that the parties who sold Standard Oil its supplies of petroleum products ("the sellers" in the underscored language) had any understanding that the products would move beyond Florida ports. In similar fashion, there is no evidence in this case that the sellers of bulk chemicals to Chemtech (see Pet. App. at 43) have any understanding of Chemtech's transportation plans.

By contrast, there is ample evidence that the shipper in Atlantic Coast Lines,

i.e. Standard Oil, did intend its shipments to reach its customers in Florida, just as Chemtech intends its chemicals to reach its customers. For example, 95% of Standard Oil's fuel oil was sold to its customers under contracts predating the oil's shipment to Florida ports. 255 U.S. at 265. Further, the 123 bulk stations in Florida to which Standard Oil's products were delivered were undoubtedly known to it prior to its purchase of bulk supplies. 275 U.S. at 264. The point here is, not surprisingly, that a shipper of bulk commodities such as Standard Oil or Chemtech clearly intends that its products reach its markets. Yet, the Court in Atlantic Coast Lines found this fact insufficient in light of other factors to convert intrastate transportation into interstate commerce. Id.

In short, by ascribing the lack of intent of Standard Oil's sellers to Chemtech, (and not Chemtech's sellers), the Commission

has contorted this Court's language in Atlantic Coast Lines to serve its preemptive purpose. Moreover, there is no indication in Atlantic Coast Lines that the Court would have ruled the other way had it found that Standard Oil's sellers did arrange for or know the ultimate destination of their products. Because the Commission has built its entire case for preemption on shipper intent, and because Atlantic Coast Lines cannot be distinguished from the alleged facts of the Missouri transportation service at issue, either on the intent issue or any other relevant factor, this Court should grant the petition and reverse the Court of Appeals affirmance of the Commission's decision.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 89-53

IN THE

Supreme Court of the United States

October Term, 1989

Missouri Division of Transportation and
Alabama Public Service Commission,
Petitioners,

v.

Interstate Commerce Commission and
United States of America, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission ("ICC" or "Commission") has primary jurisdiction to determine, in a declaratory order proceeding, whether a motor carrier subject to its regulatory control may lawfully handle movements within Missouri under the interstate operating authority issued to that carrier by the ICC.

2. Whether a motor carrier regulated by the ICC, confronted with criminal prosecution by the State of Missouri arising out of its operations in that State, may seek a declaratory order from the ICC as to the carrier's ability lawfully to perform the disputed operations under its ICC-issued permit.

3. Whether the ICC's procedures employed for this non-adversary, informal proceeding were fair where an accurate, complete, and legally sufficient notice of the proceeding was published in both the *Federal Register* and the *ICC Register*, and where all interested parties were provided a full opportunity to comment.

4. Whether the ICC correctly concluded that transportation within Missouri of goods that originate out-of-state is in interstate commerce, where the shipper's fixed and persisting intent from the time of initial shipment is that such goods move, not to the shipper's intermediate storage facility in Missouri, but to the locations of its known customers in that State.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN OPPOSITION

The National-American Wholesale Grocers' Association ("NAWGA") respectfully submits, pursuant to Rule 22 of the Rules of this Court, this Brief In Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit for review of that court's decision in *Middlewest Motor Freight Bureau, et al. v. Interstate Commerce Commission* and *United States of America and Steere Tank Lines, Inc. v. Interstate Commerce Commission and*

United States of America, respectively. The opinion of the court of appeals is reported at 867 F.2d 458 (1989) (Pet. App. 1-9).[1] The court upheld an ICC decision that certain motor carrier transportation between points in Missouri could be performed by the carrier pursuant to an interstate permit issued to it by the ICC.

IDENTIFICATION OF RESPONDENT NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

NAWGA is a national trade association comprised of grocery wholesale distribution companies which primarily supply and service independent grocers throughout the United States and Canada. It provides research, technical, educational and government relations programs on behalf of its 400 members. NAWGA members operate nearly 1,200 distribution centers nationwide with a combined annual sales volume in excess of $74 billion, accounting for nearly three-fourths of the nation's grocery supply sales. NAWGA members employ in excess of 350,000 people nationwide but, in combination with their independently owned supermarkets, they provide employment for several million people. The independent grocer represents over 50% of the total retail food sales in this country, and is one of the nation's strongest segments of independent business. NAWGA's foodservice division, the International Foodservice Distributors' Association, represents member firms that sell annually over $17 billion in food and related products to the institutional, away-from-home foodservice market. NAWGA celebrated 80 years of service to wholesale grocers in 1986.

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this case.

NAWGA was a party to the proceeding in the court below as an intervenor in support of the ICC.

STATEMENT

Since the Motor Carrier Act of 1935, 49 Stat. 543-67, 49 U.S.C. § 10101 *et seq.*, the ICC has had regulatory jurisdiction over motor carriers that provide for-hire transportation of property and passengers in interstate commerce (49 U.S.C. § 10521). The statute requires that, before a carrier may conduct such interstate trucking operations (49 U.S.C. § 10921), it must obtain from the ICC either a certificate of public convenience and necessity (49 U.S.C. § 10922) or a motor contract carrier permit (49 U.S.C. § 10923).

Where a dispute exists as to whether certain motor carrier operations are part of interstate transportation and thus capable of being performed under authority issued by the ICC, or whether such operations constitute intrastate service regulated by the states, this Court has held that the ICC is the proper forum for interpreting its authority and resolving the controversy. *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554, 558 (1958) (*"Nelson"*); *Service Storage & Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, 177 (1959) (*"Service Storage"*); *Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission*, 361 U.S. 11 (1959) (*"Jones Motor"*). This case involves just such a request to the ICC for an interpretation of the operating authority it had issued to a motor carrier subject to its regulatory control.

In 1986, Matlack, Inc. sought a declaratory ruling from the Commission that its motor contract carrier permit issued by that agency authorizes the transportation within Missouri of chemicals that originated outside that State, on the grounds that such service within Missouri is part of a continuous movement in interstate commerce. Matlack's request to the ICC

was prompted by citations it had received from Missouri officials, shortly after it began providing the subject service, who claimed that Matlack was operating in intrastate commerce without possessing the appropriate Missouri authority required therefor. The ICC instituted the requested proceeding, and notice thereof, inviting comments from interested parties, was published both in the *Federal Register* and the *ICC Register*. Twenty eight parties filed comments in the agency proceeding.

In support of its petition, Matlack presented evidence that the service it provides within Missouri for its shipper, Chemtech Industries, Inc. ("Chemtech"), is in interstate commerce and, accordingly, is able to be furnished under its ICC permit. That evidence showed, *inter alia*, that: (1) all of the bulk commodities distributed from Chemtech's facility at St. Louis, Missouri which are transported by Matlack to other points in Missouri are shipped to St. Louis from origins outside that state; (2) the commodities received at the St. Louis facility almost never remain there longer than 30 days before being shipped to Chemtech's Missouri customers; (3) none of the products are used or consumed by Chemtech, and they do not undergo any manufacturing or processing at the St. Louis facility; (4) the principal purpose of the facility is to permit the transfer of Chemtech's large volume inbound shipments into the smaller volumes required for outbound motor and rail transportation; (5) 70 to 80% of the chemicals received at Chemtech's Missouri distribution facilities is subject to existing supply contracts between Chemtech and its Missouri customers, which are entered into prior to the chemicals' shipment from the out-of-state origin; and (6) Chemtech ships the remainder of its products to the distribution facilities to fill requests of known customers based upon their past ordering practices. (Verified Statement of A. Gail Cobb of Chemtech, Pet. App. 43-47.)

In a decision served June 17, 1987, the Commission, after considering this evidence and the written submissions of the other 28 parties who participated in the proceeding, concluded that "it is evident . . . that Chemtech intended for its shipments [within Missouri] to be in interstate commerce". (Pet. App. 17) (Footnote omitted). The ICC said that the facts show that "Chemtech knows, in almost all cases, the final destination from the moment the shipment leaves its out-of-State origin" (*Id.*) (Footnote omitted), and that "Chemtech's intent is to ship not to St. Louis but to its customers." (*Id.* at 18). The ICC then added, again with respect to the shipper's intent as shown by the facts before it, that "Chemtech's intent that the chemicals move to its customers is clearly formed before they reach its facilities, by virtue of its existing customer contracts and projections of the demands of known customers". (*Id.* at 21).

The ICC, thus, concluded that the movements between points in Missouri are in interstate commerce and may be transported by Matlack pursuant to its ICC-issued permit. In so finding, the Commission relied, *inter alia*, upon the decisions of this Court in *Baltimore & O.S.W.R. Co. v. Settle*, 260 U.S. 166 (1922) ("*Settle*") and *Texas & N.O.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913) ("*Sabine*"). (*Id.* at 16-17).

Petitions to reopen this proceeding were denied by the ICC in a decision served December 31, 1987; it did, however, grant the request of petitioner Missouri Division of Transportation ("MDOT") to intervene. (Pet. App. 27, 29).[2] In denying the

[2]In adition to its petition to intervene, MDOT filed a petition to reopen, or in the alternative, for stay pending a request for judicial review. This petition was denied by the ICC in its December 31, 1987 decision (Pet. App. 27, 31, 37).

petitions, the Commission concluded, as it had in its prior decision, that since this is not an adversary proceeding, discovery and an oral hearing are not required. (*Id.* at 31-33). The ICC held that it has primary jurisdiction to decide the issues presented by the Matlack petition (*Id.* at 34), and reaffirmed its determination that the disputed transportation within Missouri is in interstate commerce and, hence, within the scope of the permit it had granted Matlack. (*Id.* at 35-37).

The court of appeals affirmed the ICC's decision. (Pet. App. 1-9). It rejected petitioners' contention that, since the disputed transportation takes place wholly within Missouri, the ICC does not have jurisdiction to decide the issues submitted to it by Matlack; the ICC, in construing the certificates it issues, is empowered to decide this matter. (Pet. App. 4-5).

On the merits, the court below reviewed the facts upon which the ICC had based its decision and concluded that it could not say that the ICC had erred in finding the subject transportation to be in interstate commerce. (Pet. App. 8). The court agreed with the ICC that this Court's decision in *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257 (1927) ("*Atlantic Coast Line*") is inapposite; in that case, there was no intent at the time of the initial movement of the products from their origin points that they were to be shipped beyond the intermediate storage facilities. (*Id.*)

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

1. For the reasons argued hereafter, this case is singularly unworthy of this Court's attention. No federal question has been decided in a way that conflicts with decisions of this Court, nor does this case present any broad question of general importance, significant new interpretation of law, or conflict with decisions of other courts of appeals.

2. The ICC had primary jurisdiction to render the decision below. Decisions of this Court and lower federal courts have consistently held that the ICC is the body with the authority to interpret the motor carrier licenses it issues. Because the ICC had primary jurisdiction, petitioners' preemption and removal arguments must fail.

3. The proceeding below was an informal, non-adversary adjudication. Accordingly, opponents of the ICC's order were not entitled to personal notice of the proceeding, nor to discovery or an oral hearing.

4. The decisions below adhered to well-established standards laid down in the decisions of this Court in determining whether movements between two points in the same state are part of a continuous movement in interstate commerce. Those decisions correctly apply that law, and are amply supported by the facts of record showing the interstate character of the movements.

A. The ICC Had Jurisdiction To Decide This Case

Petitioners' principal attack on the decision below is leveled at the court of appeals' conclusion that the ICC had jurisdiction to decide the issues presented to it by the Matlack petition. (Petition at 10-18). That assault, however, is unavailing.

The court noted that "[t]he question is whether the transportation from the distribution point in Missouri to customers in Missouri is part of a continuous interstate operation originating outside of Missouri and is thus covered by the ICC certificate, or whether the second leg of transportation is separate and wholly intrastate". (Pet. App. 5). Having stated the question, the court then concluded that "the issue is clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation", citing, among others, this

Court's decisions in *Service Storage*, *Nelson*, and *Jones Motor*, and the decisions in *Merchants Fast Motor Lines, Inc. v. ICC*, 528 F.2d 1042 (5th Cir. 1976) ("*Merchants*") and *Gray Lines Tour Co. v. ICC*, 824 F.2d 811 (9th Cir. 1987) ("*Gray Line*"). (*Id.*)

The ability of the ICC to decide whether Matlack can serve Chemtech within Missouri under its ICC authority cannot be seriously disputed; the decisions relied upon by the court below, as well as other authority, clearly establish that the Commission has primary jurisdiction to interpret the licenses it issues. See, *e.g.*, *Service Storage*, 359 U.S. at 177; *Nelson*, 355 U.S. at 558; *Gray Line*, 824 F.2d at 815; *Merchants*, 528 F.2d at 1044-45; *State of Texas v. United States of America and Interstate Commerce Commission*, 866 F.2d 1546, 1551-1554 (5th Cir. 1989); *George Transfer and Rigging Company, Inc. v. United States*, 380 F. Supp. 179, 185 (D. Md. 1974) (3-judge court), *aff'd. mem.*, 419 U.S. 1042 (1974); *Contractors Cargo Company v. United States*, 299 F. Supp. 287, 290 (C.D. Cal. 1969) (3-judge court), *aff'd. mem.*, 397 U.S. 39 (1970). The basis for this primary jurisdiction is the fact that "[t]he structuring and interpretation of a certificate of public convenience and necessity is an exercise of the Commission's special expertise." *R-C Motor Lines, Inc. v. United States*, 350 F. Supp. 1169, 1171 (M.D. Fla. 1972) (3-judge court), *aff'd. mem.*, 411 U.S. 941 (1973).

This Court made it clear in *Service Storage* that there cannot be concurrent state and federal litigation over whether transportation is embraced within a carrier's interstate authority; instead "the interpretation of [a motor carrier's] interstate commerce certificate should first be litigated before the Interstate Commerce Commission". 359 U.S. at 173. Conflicts between state and federal authorities can be avoided if such interpretations are "made in the first instance by the authori-

ty issuing the certificate and upon whom the Congress has placed the responsibility of action". *Id.* at 177.

Faced with this monolithic authority confirming the ICC's jurisdiction to decide this case, petitioners make several futile attempts to distinguish it. First, they argue that *Service Storage* and the other decisions of this Court relied upon by the court below are inapposite because, unlike this case, "the transportation movements in question *actually crossed state boundaries*". (Petition at 11) (Emphasis in original). But here, just as in *Service Storage*, the question is whether the subject movements constitute interstate transportation, and are thus able to be transported by Matlack under its ICC permit. The movements involved in this case also "actually cross state boundaries" since all of the chemicals transported within Missouri by Matlack originate outside that state.

But the issue does not turn on application of some mechanical test to determine if boundaries are traversed; the question is whether the shipments are part of a continuous interstate movement originating outside Missouri which may be transported by Matlack under its ICC permit.[3]

Petitioners further contend that no interpretation of Matlack's ICC permit was here involved; accordingly, the ICC does not have primary jurisdiction. (Petition at 11-12). This

[3]In response to arguments identical to those made by petitioners here that the subject shipments are "on their face intrastate", while those in *Service Storage* crossed state lines, the court of appeals in *Texas* said, at 866 F.2d at 1552:

> This argument fails. By directing attention to the character of the shipments involved, Texas invites us to decide the jurisdictional issue by prejudging the substantive question. *Service Storage* expressly states that "interpretations of federal certificates" should be made by the issuing agency.

The court further noted that, as in this case, the traffic involved in *Texas* did traverse state lines, just as did the traffic in *Service Storage*. 866 F.2d at 1552.

is incorrect. The question presented to the ICC was whether Matlack's operations are in interstate commerce, as its ICC permit requires in order for operations to be performed thereunder. The ICC addressed that query in its decisions below, and said that Matlack's permit authorized such service. (Pet. App. 34). That reply was a proper construction of the "interstate commerce" requirement of the Matlack permit and, as recognized by the court below (Pet. App. 5), was an appropriate response to a legitimate issue of authority interpretation. *See also, Texas*, 866 F.2d at 1551-1554. The Commission, in short, was asked to, and did, interpret the permit it had issued to Matlack.[4]

Petitioners cite not a single decision of this Court in support of their position that *Service Storage*[5] is not dispositive

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[4]Indeed, this was the same issue of interpretation as that involved in *Service Storage*. As the court in *Texas* said:

> . . . The Supreme Court [in *Service Storage*] said the ICC certificate "on its face covers the whole operation. . ."; the crucial issue that divided Virginia and the ICC was whether or not the transport was in fact intrastate rather than interstate. 359 U.S. at 178, 79 S.Ct. at 718.

866 F.2d at 1552. The court added that "[t]he fact that a route is geographically intrastate does not imply that traffic on the route is intrastate in character, and the character of the traffic is a question within the ICC's primary jurisdiction." 866 F.2d at 1553. In any event, as this Court held in *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 625-627 (1973 "*Weinberger*"), an agency has "jurisdiction to determine whether it has jurisdiction."

[5]Petitioners also attempt to distinguish *Service Storage* by claiming that its "rationale" of avoiding conflicting interpretations as to the meaning of a carrier's certificate by several states, does not apply here where only a single state — Missouri — is involved. (Petition at 11). By requiring initial resort to the ICC, *Service Storage* seeks to avoid conflicting ICC/state constructions of ICC licenses. 359 U.S. at 177-178. There is simply nothing in *Service Storage* limiting its applicability only to cases where more than one state is offering an interpretation as to the character of the same traffic.

of the jurisdictional issue. Indeed, the only authority petitioners offer is the decision of the United States Court of Appeals for the Third Circuit in *Puerto Rico Maritime Shipping Authority v. Valley Freight System*, 856 F.2d 546 (1988). That decision, however, did not involve the authority of a federal agency to determine whether a license issued by it authorized certain transportation. The failure of the Third Circuit to discuss *Service Storage* or the other authority here set forth demonstrates the irrelevance of that decision to the license interpretation issue here involved, and requires that it be given no weight.[6]

Included in petitioners' attack on the ICC's jurisdiction is an argument that the agency's interpretation of Matlack's permit unlawfully preempted Missouri's enforcement action against it, citing *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355 (1986) (Petition at 15-16). However, the ICC's action here could not be preemptive since it was within its primary jurisdiction. The Commission's decision constituted a proper exercise of its

[6]Petitioners complain that the ICC's decision will hinder their enforcement efforts by requiring them to file a petition with the ICC each time they wish to challenge the operations of ICC-regulated carriers within their borders. (Petition at 14-15.) However, states have been required to follow that procedure for at least the past 30 years, ever since this Court instructed them in *Service Storage* that their remedy in such situations was a complaint to the ICC under the Interstate Commerce Act. By petitioning the ICC "the possibility of a multitude of interpretations of the same federal certificate by several states will be avoided and a uniform administration of the Act achieved." 359 U.S. at 179. In any event, the need for state complaints to the ICC should diminish because of recent interprtations of this issue by the Commission. In the past three years, the ICC has issued numerous declaratory orders explaining the transportation that can be performed under motor carrier authority granted by it. (Petition at 16-17). These decisions provide clear guidance to motor carriers, shippers, and state officials alike as to the parameters of interstate vs. intrastate service; as a result, the need for future state enforcement in this area should be reduced.

well-established authority to interpret the permits it issues and, in so doing, determine if such permits authorize the subject transportation. If they do, then Missouri has not in any way been preempted since it has no authority to regulate that activity. *Louisiana Public Service Commission* does not hold to the contrary. There, the Court held that the FCC could not regulate intrastate telecommunications service. 476 U.S. at 370. The Court did not decide, however, that the FCC had no authority to make the initial determination as to what facilities were in interstate commerce — which it could regulate — as opposed to those in intrastate commerce — which it could not. Here, the ICC is not claiming regulatory authority over any transportation that it acknowledges is in intrastate commerce. Under these circumstances, petitioners' notions of preemption are misplaced.[7]

B. The Remainder of Petitioners' Arguments Are Similarly Without Merit

1. Petitioners contend that it was unlawful for Matlack to be allowed to "remove" its federal defenses to the Missouri prosecutions from state court to the ICC. (Petition at 18-21).[8] However, no such removal of a matter within Missouri's jurisdiction here occurred. None of the cases relied upon by petitioners in support of this argument[9] involved issues within the primary jurisdiction of a federal agency and a request to that agency for a determination thereof. As with their preemp-

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[7]See also, *Texas*, 866F.2d at 1553.

[8]The traffic tickets received by Matlack had been docketed for prosecution as criminal misdemeanor charges in Franklin County, Missouri Circuit Court.

[9]*Public Service Commisson of Utah v. Wycoff Co.*, 344 U.S. 237 (1952) (*"Wycoff"*); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). (Petition at 19-20).

tion argument, petitioners seem to lose sight of the primary — if not the exclusive — role this Court has conferred upon the ICC in interpreting the authority it issues.

The decision in *Wycoff* is inapposite for other reasons as well. First, no case or controversy was there present, a prerequisite to issuance of the declaratory judgment sought from the federal district court. 344 U.S. at 242-243. There was no indication, for example, that the State had taken any enforcement action against the motor carrier seeking the declaratory judgment; a fact the Court deemed significant. 344 U.S. at 247-248. However, the "case or controversy requirement does not restrict an agency's authority to issue declaratory rulings under 5 U.S.C. § 554(e) . . ." *Texas*, 866 F.2d at 1551. In any event, a controversy does here exist; Missouri believes that the Matlack operations are in intrastate commerce for which Missouri authority and the use of intrastate rates are required. In fact, not only is a significant disagreement among the parties present but, as noted, Missouri issued citations against Matlack for the transportation it alleged to be intrastate and Matlack faced criminal prosecutions arising out of such citations (Petition at 19).

Finally, the action in *Wycoff* was filed in a federal district court, not before the ICC. Even though it was decided before *Service Storage*, *Wycoff* foreshadows that later decision by concluding that, even aside from the fatal absence of a case or controversy, a petition for declaratory judgment by a court cannot be employed "to forestall proceedings by . . . the Interstate Commerce Commission or . . . agencies that are authorized to try and decide such an issue in the first instance." 344 U.S. at 246.[10] While this Court's later decision in *Service Storage* established the ICC's authority to determine the

[10] *See, also, Texas*, 866 F.2d at 1553-1554.

meaning and applicability of the permits it issues, and it is that decision which governs this case, even *Wycoff* suggests that had the parties there sought a decision by the ICC, rather than the district court, its conclusion might have been different.

2. Petitioners also contend that this Court should review and reverse the decision of the court below because petitioner MDOT, who participated in the ICC proceeding by filing a petition to reopen and alternative request for stay, was not provided with personal notice thereof, and because the ICC's procedures deprived petitioners of a fair adjudication. (Petition at 21-24). Even assuming that MDOT's actual participation in the agency proceeding does not defeat its notice argument, petitioners concede that notice of the ICC's proceeding was provided by publication in both the *Federal Register* and the *ICC Register*. (Petition at 21). Petitioners make no claim that the notices were inaccurate or incomplete; accordingly, their publication constituted legally sufficient notice of the ICC proceeding to all interested persons. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-385 (1947).[11]

Neither was the ICC required to conduct an oral hearing in this case, or to grant petitioners' requests for discovery.

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[11]MDOT's claim that it was entitled to a more personalized form of notice than that provided all other intersted parties in this case — as noted, 28 parties responded to that notice and filed comments with the ICC — is allegedly supported by this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). That case, however, did not involve publication of an agency notice in the *Federal Register* which, as seen, constitutes legal notice to all concerned. Instead, in *Mullane* a trust company published in a local newspaper notice of a judicial action that would finally determine the rights of certain parties. Indeed, the action noticed would deprive those parties of certain property rights which, under the Due Process Clause of the Fourteenth Amendment, required that personal notice be afforded them. 339 U.S. at 313. No such denial of MDOT's property rights resulted from the ICC proceeding in which, in any event, it participated.

An agency is only required to grant discovery and hold a hearing in an adjudicatory proceeding if the matter comes within the provisions of Section 554(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(a). That Section "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Although this was an adjudicatory proceeding as defined in 5 U.S.C. § 551(7), despite petitioners' repeated mischaracterizations of it as such, it was not adversary in nature. Section 554(e) of the APA, which authorizes informal declaratory order proceedings such as here involved, does not require a formal oral hearing process in such proceedings, nor does Section 554(a) impose a "blanket" oral hearing requirement on all agency adjudication.[12] The ICC gave all interested parties a full opportunity to participate; it was not required to employ a more formal procedure designed for adversary trial-type proceedings.[13]

3. With respect to the merits of Matlack's petition, the court of appeals concluded that the ICC correctly determined that the subject shipments moved in interstate commerce and

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[12]Even if Section 556 were applicable to this proceeding, it does not require an oral hearing. This Court said in *United States v. Florida East Coast Railway Company*, 410 U.S. 224, 240 (1973), that the term "hearing" as used in the APA "does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." *See, also*, 410 U.S. at 241. In *Texas*, the Fifth Circuit, describing the same procedure employed by the ICC in interpreting the ICC authority involved in that case, said the " 'paper hearing' conducted by the ICC provided all parties with adequate opportunity to comment, and so conformed to the APA's hearing requirements". 866 F.2d at 1555.

[13]*Vermont Yankee Nuclear Power Corp. v. Natural Res. D.C.*, 435 U.S. 519, 543 (1978) (Administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."); *Weinberger*, 412 U.S. at 625-26.

were, thus, able to be transported by Matlack under its ICC permit. (Pet. App. 6-8). In attacking this conclusion, petitioners argue that two decisions of this Court compel a different result. (Petition at 24-26.)

Petitioners contend that the facts in this case are "virtually identical" to those in *Atlantic Coast Line,* in which the Court found certain single-state rail movements to be in intrastate commerce. As noted above, both the court of appeals and the ICC found that *Atlantic Coast Line* is readily distinguishable. (Pet. App. 8, 18-19). First and foremost, in that case there was no intent at the time of the initial movement of the products from their out-of-state origins that they were to be shipped beyond the intermediate storage facilities. The Court, in finding the shipments from those facilities to be intrastate, said that "[t]here is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company . . ." 275 U.S. at 269.

Indeed, there could be no intent in that case at the time of the initial shipment that the goods move beyond the storage point since the movements inbound thereto and outbound therefrom were arranged by *two different shippers*. 275 U.S. at 267, 269. This duality of shippers destroyed the continuity of the requisite intention and, thus, of the movement. Only after the fuel oil had come to rest at the storage facilities did the second shipper decide where, among scores of possible destinations, the oil would be shipped. 275 U.S. at 265, 269. As the court of appeals in *Texas* said in agreeing with the court below that *Atlantic Coast Line* was not apposite to the transportation involved in that case:

> [I]n *Atlantic Coast Line* the shipments were to warehouses run by local, independent wholesalers, *who themselves designated the final destination of the*

cargo. The Supreme Court explained the importance of this fact in determining whether shipments out of the warehouse were the continuations of an interstate movement:

> Neither the sellers, who deliver the oil, nor the railroad company, that aids the delivery of the oil to the storage tanks and tank cars at the seaboard, has anything to do with determining what the ultimate destination of the oil is . . .
>
> In contrast here, . . . the out-of-state shipper, determines the final destination.

866 F.2d at 1557 (Emphasis added) (Footnotes omitted). In short, the "controlling fact" (Pet. App. 8) in *Atlantic Coast Line* is that the goods were stockpiled at the storage point for eventual movement from that point to ultimate customers designated by persons other than the original out-of-state shippers. 275 U.S. at 269. Here, on the other hand, the ICC found and the facts show that there is a single shipper — Chemtech — who "intends that its product continue movement through St. Louis for delivery to known customers". (Pet. App. 8). As described in the Statement, *supra*, Chemtech intends that its shipments go to its identified customers in Missouri either pursuant to preexisting supply contracts or similar sales arrangements, or to fill requirements of those known customers based upon their past ordering practices. In both cases, the criteria established by this Court for determining that these single-state movements are in interstate commerce are satisfied —Chemtech intends that the goods come to rest only after they have moved through its intermediate distribution facilities and have reached the locations of its known customers. See, *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-69 (1943); *Settle*, 260 U.S. at 170-171, 173-74; *Sabine*, 227 U.S. at 125, 126, 130; *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 526-527 (1911) ("*Southern*

Pacific''). See also, Country Maid, Inc. v. Haseotes, 324 F. Supp. 875, 877 (E.D. Pa. 1971). Hence, *Atlantic Coast Line* is inapplicable.[14]

Petitioners also assert that the court below failed to apply this Court's decision in *Pennsylvania R.R. v. Public Utilities Comm'n. of Ohio*, 298 U.S. 170 (1936). In that decision, the Court held that a single-state movement by rail was not part of interstate transportation because the preceding movement into the State by private carriage was not ''transportation'' within the meaning of the Interstate Commerce Act. This decision does not apply, however, to single-state *motor* movements preceded by exempt interstate movements.

As the ICC explained in a recent decision,[15] its jurisdiction over rail and motor transportation is not identical. Its rail jurisdiction is limited to transportation from one state to another and, with certain limited exceptions involving import and export traffic, does not include transportation conducted wholly within one state. (App., p. 3a).[16] The ICC's motor car-

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[14]Petitioners claim (Petition at 26) that Chemtech is not the ''shipper'' because it is the purchaser, and not the seller, of the goods on their movements inbound to the St. Louis facilities. Chemtech, as seen, ''cause[s] [the commodities] to be shipped'' to its intermediate distribution facilities. (Pet. App. 45). As such, it is the ''shipper'' of such commodities even though, on the inbound leg to its facilities, it is the purchaser thereof. *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court) (*''North Carolina''*). This is consistent with Chemtech's statements that at all times it intends that the chemicals are to be shipped to their ultimate destinations.

[15]No. MC-C-3002, *Victoria Terminal Enterprises, Inc. — Transportation of Fertilizer Within Texas — Petition For Declaratory Order*, served February 3, 1989, petition for review pending, United States Court of Appeals for the Fifth Circuit, No. 89-4114, *Steere Tank Lines, Inc. v. Interstate Commerce Commisson, et al.* A copy of the ICC's February 3, 1989 decision is included as an appendix hereto.

[16]*See, Long Beach Banana District v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied*, 396 U.S. 819 (1969).

rier jurisdiction is broader, and authorizes the ICC to regulate such transportation in interstate and foreign commerce; interstate commerce is defined as "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, *or water*". (App., p. 3a) (Emphasis added). In sum, with respect to motor transportation, the ICC has jurisdiction over any such transportation which is a part of interstate commerce.

In contrast to the inapposite precedent relied upon by petitioners, the ICC and the court below correctly applied the numerous decisions of this Court, lower federal courts, and the ICC that require the conclusion that under the facts here present, the subject transportation is in interstate commerce.[17] Petitioners make no attempt to challenge the applicability of these decisions to this case; indeed, no such challenge is possible.

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[17]Those decisions include, among others, *Settle; Sabine; North Carolina; Southern Pacific; Rogers Transfer, Inc. Declaratory Order*, 126 M.C.C. 448 (1977). Other decisions which support the actions of the ICC and the court below include *Walling*, 317 U.S. at 567-69 and *Texas*, 866 F.2d at 1556-1561.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: August 9, 1989

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30002

VICTORIA TERMINAL ENTERPRISES, INC. — TRANSPORTATION OF FERTILIZER WITHIN TEXAS — PETITION FOR DECLARATORY ORDER

Decided: January 27, 1989

Pursuant to 49 U.S.C. 10322(g)(1), we reopened this proceeding for the limited purpose of reconsidering that portion of our prior decisions relating to our jurisdiction over the ex-water motor movements involved in this case.[1]

In our prior decisions (served December 15, 1987 and April 29, 1988), we accepted (without analysis) the opponents' assertion that the Commission lacks jurisdiction over the single-State motor carrier movements that involve traffic having a prior bulk barge movement from an out-of-State origin. We then concluded that, even though the Commission lacks regulatory jurisdiction over such movements, it has the responsibility and expertise to determine whether those single-State movements constitute a part of a continuing interstate transportation movement and hence are beyond the (intrastate) regulatory purview of the States.

The proposition that the ex-barge movements are not subject to Commission regulation was based in large part on a review board decision in *Behnken Truck Service, Inc., Ext.*

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[1]On January 18, 1989,the United States Court of Appeals for the Fifth Circuit granted our motion for voluntary remand in Nos. 88-4001 and 88-4379, *Steere Truck Lines, Inc. v. Interstate Commerce Commission and United States of America,* to permit us to reconsider this issue.

- *Exbarge Traffic*, 103 M.C.C. 787 (1967). *Behnken*, in turn, was based upon a decision of the Supreme Court in *Pennsylvania Railroad Co. v. Public Utilities Commmission of Ohio*, 298 U.S. 170 (1936). In *Pennsylvania*, the Court held that a single-State movement by rail was not part of interstate transportation (and thus could be regulated by the State) because the preceding movement into the State by private carriage was not "transportation" within the meaning of the Interstate Commerce Act.

In *Behnken* (and several earlier decisions), the *Pennsylvania* rationale was applied in determining that the Commission lacked jurisdiction over a single-State motor carier movement of goods that had entered the State by an exempt move. The board felt constrained to this conclusion because:

> The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation. . . .

Behnken, supra, 103 M.C.C. at 796, citing *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964).

Upon closer analysis, we believe the review board erred in the *Behnken* line of cases in applying the holding of *Pennsylvania*, regarding the extent of the ICC's *rail* jurisdiction, to a determination of its *motor* jurisdiction. This conclusion is based on the original (pre-recodification) language of the Interstate Commerce Act setting forth the Commission's jurisdiction over these modes.[2]

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[2]By Act of October 17, 1978, Pub. L. 95-473, 92 Stat. 1466, the Interstate Commerce Act was recodified. Section 3(a) provides that the recodification "may not be construed as making a substantive change in the laws repealed." *Atchison, T., & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980), *Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979).

In the *rail* area, the original Interstate Commerce Act conferred upon the ICC juridiction over the transportation by railroad (as pertinent here) "from one State . . . to any other State" (section 1(1)), but not rail transportation that is conducted "wholly within one State" (section 1(2)(a)).

By contrast, in the *motor* area, Congress granted the Commission jurisdiction over transportation "in interstate and foreign commerce" (section 202(a)) and reserved to the States the power to regulate "intrastate commerce by motor carriers on the highways thereof" (section 202(b)(1)). It defined "interstate commerce" as "commerce between any place in a State and any place in another State. . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water" (section 203(10)).

Thus, the distinction made in the *Pennsylvania* case between "transportation" and "commerce" is necessary in the rail area, but not in the motor area. The statute does not preclude the Commision from licensing and regulating *motor* carriage that is conducted in interstate commerce, even if it does not regulate the transportation at the moment it crosses State lines.

Moreover, logically the fact that the ICC does not regulate the water portion of the movement ought not to be a critical determinant of its jurisdiction over the motor portion. If the fertilizer in this case had come into Texas by ship from a foreign country, the Commission would not regulate its mode of entry. Yet in that situation it is well settled that the Commission could regulate the subsequent movement by motor carriage within a single State (so long as the continuity of movement is not broken). See, for example, *Long Beach Banana Dist. v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied* 396 U.S. 819; *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966 (3-judge court).

In sum, we believe that whether a particular motor movement is considered to be interstate or intrastate should not depend upon how the fertilizer being moved by truck within Texas happened to cross the State line.[3] Therefore, we expressly overrule the review board decision in *Behnken*.[4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Our prior decisions in this case are modified to the extent set forth above.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee
Secretary

(SEAL)

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[3]Compare, *ICC v. Texas*, ____ U.S. ____, 107 S.Ct. 787, 793 (1985) (ICC to determine the proper interrelationship of different modes of transportation and to impartially regulate competing modes).

[4]To the extent that the *Behnken* analysis might appear to have been reaffirmed in Ex Parte No. MC—182, *United States Department of Transportation — Petition for Rulemaking — Single State Transportation in Interstate or Foreign Commerce* (not printed) (January 28, 1987), and other cases, we disavow the statements made in those cases on this point.

VICE CHAIRMAN SIMMONS, dissenting:

I believe that the approach taken by the majority in overturning the *Behnken* precedent is arbitrary and capricious. The decision overturns *Behnken* without comment or notice. Furthermore, the majority's justification for doing so is unpersuasive. *Behnken* correctly relied on *Penn. R. Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). There the Supreme Court established the proposition that when transportation within a single state has been preceded by out-of-state barge movements, commerce for ICC purposes does not actually begin until placed in the possession of a carrier subject to regulation by us. The contention that the *Pennsylvania* principle is triggered only when rail movements are involved has no basis in law. The principle applies equally to motor carrier movements preceded by out of state barge movements. Nor has Congress ever made such distinction either directly or by inference. Moreover, Congress had the opportunity to make its intentions clear and overrule *Behnken* with the passage of the 1980 Motor Carrier Act. As the Supreme Court observed: "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be". 298 U.S. 177.

COMMISSIONER LAMBOLEY, dissenting:

I do not agree with this attempt by the majority to bolster its original decision's jurisdictional basis. Additionally, and more fundamentally, I reaffirm my dissent to the ultimate holding of this case as stated in my dissenting separate expression to the decision served December 15, 1987.

No. 89-53

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI DIVISION OF TRANSPORTATION, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission (ICC) has primary jurisdiction to determine whether the in-state movement of goods, after shipment from out-of-state sources, is part of continuous interstate transportation subject to ICC regulation under the Interstate Commerce Act.

2. Whether the ICC properly concluded that the described transportation of chemicals from points outside Missouri through a distribution point in St. Louis to other points in Missouri constitutes continuing interstate transportation.

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No. 89-53

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 867 F.2d 458. The decisions of the Interstate Commerce Commission (Pet. App. 10-25, 27-40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41-42) was entered on February 3, 1989. A petition

for rehearing was denied on April 10, 1989 (Pet. App. 26-27). The petition for a writ of certiorari was filed on July 10, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2350.

STATEMENT

1. The Interstate Commerce Commission has regulatory jurisdiction over interstate transportation by motor carriers. 49 U.S.C. 10521(a)(1)(A) (1982 & Supp. V 1987). To conduct operations that are subject to ICC jurisdiction, a carrier must obtain an appropriate certificate from the ICC pursuant to 49 U.S.C. 10921. States retain authority to regulate wholly intrastate motor carrier transportation. 49 U.S.C. 10521(b).

The ICC is entrusted with authority to interpret the motor carrier certificates that it issues. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171, 173 (1959); *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558-559 (1958). Like other administrative agencies, the ICC possesses general authority to proceed by declaratory order. 5 U.S.C. 554(e); *Service Storage*, 359 U.S. at 177-178.

2. In July 1986, Matlack Inc. (Matlack) sought a declaratory order by the ICC concerning the scope of its ICC certificate. At the time, Matlack held motor contract carrier authority to transport general commodities between points in the United States under continuing contracts with manufacturers, distributors, and receivers of, among other commodities, chemicals and related products. Pet. App. 13. Matlack did not have any intrastate authority in the

State of Missouri.[1] Under contract with Chemtech Industries (Chemtech), Matlack transported bulk chemicals, which originated from points outside Missouri and which were brought to Chemtech's Missouri facilities by barge, rail, and motor carrier, from a Chemtech facility in St. Louis to ultimate destinations in Missouri and other states. *Id.* at 13-14. Matlack had received citations from Missouri officials on the ground that the movements within Missouri were intrastate and that Matlack did not possess intrastate operating authority. *Ibid.*

In October 1986, acting on Matlack's request, the Commission instituted a proceeding and published notices inviting comment in the *Federal Register* and the *ICC Register*. Twenty-eight parties commented. Pet. App. 10.

In June 1987, the ICC issued a declaratory order concluding that the shipments which Matlack described were part of continuous interstate transportation (*Matlack I*, Pet. App. 10-25). The Commission first denied requests for discovery and an oral hearing, explaining that its decision would be "limited to the facts presented" (*id.* at 12), and that the order did not preclude challenges to Matlack's actual operations if Matlack's description was not accurate or if Matlack performed other services (*ibid.*). The Commission also noted that the State of Missouri had not participated in the proceeding. *Id.* at 15.

The Commission then addressed the merits. It stated that "the shipper's fixed and persisting intent at the time of shipment" is "[c]rucial to a determination of the essential character of a shipment" (Pet.

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[1] Matlack has now obtained intrastate authority from the State of Missouri. Pet. 4 n.1.

App. 16-17), and observed that the "question of whether goods come to rest in a warehouse or other storage facility must be decided on a case-by-case basis." *Id.* at 18. The Commission concluded that several factors supported characterizing Chemtech's shipments as continuous interstate commerce: the shipments moved promptly from their out-of-state sources to their ultimate destinations; Chemtech usually knew, on the basis of supply contracts and sales arrangements, the final destination from the moment a shipment left its out-of-state origin; no manufacturing or processing took place at the initial in-state site; and the initial in-state site was a temporary storage facility that allowed Chemtech to convert large volume movements into smaller volumes. *Id.* at 17-20.

Several petitions for reconsideration were filed, including a petition to intervene and reopen by the Missouri Division of Transportation (MDOT) and a petition to reopen by the Alabama Public Service Commission. In December 1987, the Commission issued a second decision (*Matlack II*, Pet. App. 27-40). Noting MDOT's claim that it had not been aware of the proceedings despite the notices in the *Federal Register* and the *ICC Register*, the Commission granted MDOT's petition to intervene and considered its objections. Pet. App. 28-29. The Commission reaffirmed that discovery was unnecessary (*id.* at 31-33); responded to challenges to its jurisdiction by emphasizing that "[i]t is settled law that we have primary jurisdiction over the interpretation of federal motor carrier certificates" (*id.* at 34); and again concluded that Chemtech's shipments "constitute continuous movements in interstate commerce" (*id.* at 37).

3. The court of appeals upheld the Commission's decision in all respects (Pet. App. 1-9). It first affirmed that the Commission had jurisdiction over the issue. The court concluded that, under the established principles of *Service Storage* v. *Virginia*, *supra*, the question whether the in-state transportation of the chemicals, after shipment from out-of-state sources, represented part of a continuous interstate operation was "clearly within the ICC's jurisdiction in interpreting whether its certificate covers the transportation." Pet. App. 5. The court also affirmed the Commission's conclusion that the essential character of the transportation at issue was interstate. *Id.* at 6-8. Noting the narrow standard for judicial review of this kind of administrative determination (*id.* at 6), the court cited the Commission's findings about the factors supporting characterization of the shipments as part of interstate commerce (*id.* at 7-8) and concluded that the ICC's decision was not "arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence on the record as a whole." *Id.* at 8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. Petitioners principally object (Pet. 10-18) to the conclusion that the ICC had primary jurisdiction to hear and decide this case. Contrary to petitioners' contentions, however, the Commission's exercise of primary jurisdiction in this case was solidly grounded in the principles of *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959). In

Service Storage, this Court reversed a State's assertion of jurisdiction over what the State deemed to be intrastate movements by a motor carrier; the carrier possessed an ICC certificate for interstate commerce and claimed that the movements were authorized interstate movements. This Court held that "interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom Congress has placed the responsibility of action." *Id* at 177. *Service Storage* thus stands for the proposition that questions about the scope of an ICC certificate should be addressed in the first instance to the Commission.[2]

Petitioners contend (Pet. 11) that *Service Storage* and succeeding cases are not applicable because the transportation movements in those cases actually crossed state boundaries; in contrast, the present case involves a "single-state situation." This attempt to distinguish the *Service Storage* line of cases is unavailing for at least two independent reasons. First, petitioners' argument assumes the outcome of the

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[2] See, *e.g.*, *Jones Motor Co.* v. *Pennsylvania Public Utility Comm'n*, 361 U.S. 11 (1959) (summarily reversing state court judgment on the basis of *Service Storage*); *Gray Lines Tour Co.* v. *ICC*, 824 F.2d 811, 815 (9th Cir. 1987); *Merchant's Fast Motor Lines, Inc.* v. *ICC*, 528 F.2d 1042, 1044-1045 (5th Cir. 1976); *George Transfer & Rigging Co.* v. *United States*, 380 F. Supp. 179, 185 (D. Md.) (3-judge court), aff'd mem., 419 U.S. 1042 (1974); *Contractors Cargo Co.* v. *United States*, 299 F. Supp. 287, 290 (C.D. Cal. 1969) (3-judge court), aff'd mem., 397 U.S. 39 (1970). See also *R-C Motor Lines, Inc.* v. *United States*, 350 F. Supp. 1169, 1171 (M.D. Fla. 1972) (3-judge court) ("[t]he structuring and interpretation of a certificate of public convenience and necessity is an exercise of the Commission's special expertise"), aff'd mem., 411 U.S. 941 (1973).

analysis: that the disputed movement is separate from, and not a continuation of, the first leg of the transportation (which clearly crosses state lines). As the United States Court of Appeals for the Fifth Circuit has pointed out in response to the same argument, a "judgment about the superficial merits of a claim goes to the proper disposition of the claim, rather than to jurisdictional authority to dispose of the claim at all." *Texas* v. *United States*, 866 F.2d 1546, 1552 (1989).

Second, as the Fifth Circuit has also pointed out, the issue in *Service Storage* (an in-state to out-of-state to in-state shipment) and the issue in this case (an out-of-state to in-state to in-state shipment) are "not as distinct" as petitioners contend: "In both cases, there is no doubt that the goods being transported have crossed state lines * * *. In both cases, the issue is whether the undisputed border crossings suffice to make certain portions of the journey * * * interstate rather than intrastate." 866 F.2d at 1552. No court has ever given *Service Storage* the reading urged by petitioners.[3]

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[3] The recent opinion in *Texas* v. *United States*, 866 F.2d 1546 (5th Cir. 1989), is particularly noteworthy because of its close similarities to this case. Like the Eighth Circuit here, the Fifth Circuit unanimously concluded that the ICC's exercise of primary jurisdiction was proper. 866 F.2d at 1551-1554. On the merits, moreover, like the Eighth Circuit, the Fifth Circuit affirmed the standard employed by the Commission. *Id.* at 1556-1561. Dissenting in part, Judge Higginbotham explicitly distinguished the Eighth Circuit opinion and noted that the "ICC's reasonable general interpretation" was sufficient to decide this case. *Id.* at 1567 (Higginbotham, J., concurring in part and dissenting in part). Although the Eighth Circuit specifically mentioned the then pending Fifth Circuit case (Pet. App. 5 n.3), and despite its obvious rele-

Petitioners also maintain (Pet. 11-14) that the ICC's primary jurisdiction does not extend to questions concerning its own jurisdiction, and that, in this case, unlike *Service Storage*, the Commission is determining its own jurisdiction. It is settled, however, that an agency's "jurisdiction to determine whether it has jurisdiction is as essential to its effective operation as is a court's like power." *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973). Despite petitioners' disavowals, moreover, their objections would apply equally to *Service Storage* itself and to every application of *Service Storage*. In each case, the Commission is, in a similar sense, determining whether it has jurisdiction; a decision that particular movements are not within interstate commerce is a determination that the Commission does not have jurisdiction over the movements.[4] Petitioners' position thus conflicts with established principles of administrative law, and of the *Service Storage* doctrine in particular.[5]

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vance, petitioners fail to address the subsequently issued Fifth Circuit decision.

[4] See, *e.g.*, *Service Storage*, 359 U.S. at 175 (Virginia had taken position that Service Storage's shipments were "clearly intrastate in character").

[5] Petitioners rely heavily (Pet. 12-14) on *Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Systems, Inc.*, 856 F.2d 546 (3d Cir. 1988). *Puerto Rico*, however, is exceedingly weak authority for petitioners' position. First, *Puerto Rico* involves appellate review of a district court decision not to dismiss an action on primary jurisdiction grounds (a decision that, as the court of appeals noted, *id.* at 549, is reviewable only for an abuse of discretion), rather than review of an agency's exercise of primary jurisdiction, as in the instant case. Second, the language quoted at length by petitioners (Pet. 13) is an alternative holding; the party urging

Petitioners attempt to bolster their jurisdictional objections by arguing that the Commission's decision represents unauthorized preemption of state law (Pet. 15-16). Petitioners assert that the Commission's decision impermissibly preempts state regulation of intrastate transportation, and thus violates 49 U.S.C. 10521(b) and *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). Once again, however, petitioners improperly assume their conclusion by resting their jurisdictional objection on the resolution of the substantive issue. In any event, nothing in *Louisiana Public Service*, which concerned the Federal Communications Commission's (FCC's) attempt to regulate the depreciation of concededly intrastate aspects of telephone plant and equipment, remotely suggests that the determination whether a particular subject is interstate or intrastate is itself an unauthorized preemption. To the contrary, the Court repeatedly cited the Communications Act provision that provides a process, under federal law, for allowing the FCC to make that determination. See *id.* at 369, 375 (citing 47 U.S.C. 410(c)); *Texas* v. *United States*, 866 F.2d at 1553 (distinguishing *Louisiana Public Service* from the ICC's exercise of primary jurisdiction).

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dismissal on primary jurisdiction grounds had been dilatory about raising the issue, and that tardiness itself was sufficient to validate the district court's exercise of discretion. 856 F.2d at 549. Third, the court of appeals noted that primary jurisdiction had been exercised in a closely related case, *id.* at 549-550, and proceeded to use the agency's analysis in that case as the basis for its resolution of the merits. *Id.* at 552; see also *ibid.* (noting that the "rule of deference is fully applicable to an agency's interpretation of its own jurisdiction"). Finally, the *Puerto Rico* opinion simply does not address *Service Storage*, or the doctrine for which it stands.

Finally, petitioners argue (Pet. 14-18) that the decisions by the court of appeals and the Commission will interfere with state administration of transportation systems. However, the principle that particular in-state shipments may be part of the continuous movement of interstate commerce is hardly novel.[6] *Service Storage* itself, moreover, specifically emphasizes the importance of having the Commission, rather than the State, resolve questions about the scope of a certificate. 359 U.S. at 177-178. Petitioners' protests notwithstanding, the Commission's decision in this case was squarely within the mainstream of the *Service Storage* doctrine and represents no expansion of those settled principles.[7]

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[6] See, *e.g.*, *Baltimore & O.S.W.R.R.* v. *Settle*, 260 U.S. 166 (1922) (movement of goods from Oakley, Ohio to Madisonville, Ohio is part of continuous movement of interstate commerce); *Texas & N.O.R.R.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913) (movement of goods from Ruliff, Texas to Sabine, Texas is not intrastate).

[7] Petitioners also claim that the Commission's exercise of jurisdiction was improper for two other reasons: it was analogous to an impermissible federal removal (Pet. 19), and it was an abuse of discretion (*id.* at 19-20) that violated principles of federalism established in *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237 (1952). These points are similarly unavailing. The difficult "arising under" federal jurisdiction analysis at issue in cases like *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), and *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), is obviously inapplicable. The Commission's declaratory order, and the petition for review in the court of appeals, were explicitly authorized by federal statutes. Far from representing an abuse of discretion, moreover, the Commission's decision to issue a declaratory order was perfectly consistent with the emphasis in *Service Storage* on the desirability of a declaratory order by the Commission. See

2. Petitioners also contend (Pet. 21-22) that the ICC should have provided MDOT with personal notice of the declaratory order proceeding. However, the *Federal Register* and *ICC Register* notices were accurate and complete and constituted legally sufficient notice to all interested persons. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947).[8] Twenty-eight parties participated in the initial proceeding, including petitioner Alabama Public Service Commission. Even if the notice had been somehow inadequate, moreover, MDOT clearly was not prejudiced in any way. It was permitted to intervene in *Matlack II* (Pet. App. 29), and the Commission fully considered its arguments (*id.* at 33, 34). In short, the State of Missouri had an adequate opportunity to participate in this proceeding.

3. Petitioners maintain (Pet. 22-24) that the Commission was required to permit depositions and to conduct an oral hearing and an extensive factual investigation. The Commission, however, has broad discretion in the conduct of its proceedings. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 (1978). To the extent that a hearing was required at all, the Commission's use of a "paper

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Service Storage, 359 U.S. at 177-178; *Texas* v. *United States*, 866 F.2d at 1553-1554.

[8] The only case petitioners cite, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), is inapposite. That case involved the inadequacy of an ad placed by a trust company in the back pages of a local newspaper (giving notice of a judicial settlement affecting numerous beneficiaries of a common trust fund) when the names and addresses of some of the beneficiaries were known. *Mullane* does not address the adequacy of governmental notice through publication in the *Federal Register* and *ICC Register*, and does not purport to upset or modify the holding in *Merrill*.

hearing," rather than oral testimony and argument, was entirely appropriate. *Texas* v. *United States*, 866 F.2d 1546, 1555 (5th Cir. 1989).[9] Particularly in view of the limited scope of the Commission's order —confined to the facts as presented, with an explicit statement that any party could institute proceedings to prove that the actual facts are different (Pet. App. 12, 32-33)—the Commission's determination not to permit extensive discovery was entirely reasonable. If petitioners (or any other parties) have evidence that Matlack is conducting its operations in a manner that is inconsistent with what has been described, they may file a complaint directly with the ICC under 49 U.S.C. 11701 (1982 & Supp. V 1987) (or with the appropriate federal district court under 49 U.S.C. 11708 (1982 & Supp. V 1987)). They would then have access to the hearing and discovery procedures that are available under the ICC's General Rules of Practice (49 C.F.R. Pts. 1101-1114).

4. Petitioners also challenge (Pet. 24-26) the Commission's substantive conclusion (Pet. App. 16-22, 35-37), affirmed by the court of appeals (*id.* at 6-8), that the disputed transportation is interstate in character. Petitioners maintain that the analysis conflicts with two precedents from this Court concerning rail shipments.

First, petitioners argue that *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257 (1927), compels a contrary result. They maintain that, except for the use of rail carriers instead of motor carriers,

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[9] See also *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 626 (1973) (industry argument "assumes an individualized hearing and adjudication as is common in regulatory proceedings. Section 554(e), however, does not place administrative proceedings in that straitjacket.").

the facts in *Atlantic Coast Line* are "virtually identical" to the facts of this case (Pet. 25), and that the Commission improperly focused on Chemtech, which was the "*receiver* of goods," rather than the shipper. *Id.* at 26 (emphasis in original). Both suggestions are incorrect. The facts in *Atlantic Coast Line* were far from identical to the facts considered by the Commission in this case. In *Atlantic Coast Line*, Standard Oil of Kentucky stockpiled large quantities of oil at seaboard facilities, and, with no fixed arrangements for subsequent movements, provided the oil to customers as the demand arose (275 U.S. at 265, 269); here, in contrast, from the outset Chemtech had specific arrangements to ship the chemicals to their ultimate destinations. Pet. App. 17-19, 36-37. Similarly, the Commission's characterization of Chemtech as the "shipper" responsible for the entire interstate movement was completely proper. The record before the Commission specifically indicates that it is Chemtech who causes the chemicals to be shipped on both legs of the transportation (*id.* at 45); this record amply supports the Commission's finding that there is a "continuity of the single interstate movement from the product's origin point (which is always outside Missouri) to Chemtech's customers." *Id.* at 19.[10] By contrast, the involvement of two separate shippers in movements to different destinations—the first to

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[10] In *North Carolina Utilities Comm'n* v. *United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court), the court similarly relied on the intent of a North Carolina importer of goods who caused the shipment of goods to in-state docks and then on to ultimate in-state destinations. *Id.* at 936. In *Matlack II*, the Commission noted that the "reasoning and conclusions of *North Carolina* are equally compelling here" (Pet. App. 36), and considered the similarities in the cases. *Id.* at 36-37.

the point of temporary storage, the second from the point of temporary storage—necessarily broke the continuity of movement in *Atlantic Coast Line*. See 275 U.S. at 267, 269.

Second, petitioners claim (Pet. 25) that, under *Pennsylvania R.R.* v. *Public Utilities Comm'n*, 298 U.S. 170 (1936), shipments brought into the State by transportation not subject to ICC jurisdiction (such as barges, see 49 U.S.C. 10542 (1982 & Supp. V 1987)) are intrastate shipments. However, *Pennsylvania R.R.* does not apply here; in any event, this issue is not suitable for review in this case.

In *Matlack I*, the Commission concluded (Pet. App. 21-22) that, under the principles of *Pennsylvania R.R.* and subsequent ICC decisions, it could not regulate shipments that originated from exempt transportation, and that the States also could not regulate such shipments. In February 1989, however, in a separate proceeding,[11] the Commission revised its interpretation of the reach and effect of *Pennsylvania R.R.*, distinguishing between its jurisdiction over rail transportation (as in *Pennsylvania R.R.*) and its jurisdiction over motor transportation; the Commission explicitly overruled ICC cases to the contrary.[12] The Commission's position now is that it may

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[11] See *Victoria Terminal Enterprises, Inc.—Transportation of Fertilizer Within Texas—Petition for Declaratory Order*, No. MC-C-30002, served Feb. 3, 1989, pending review *sub nom. Steere Tank Lines Inc.* v. *ICC*, No. 89-4114 (5th Cir.). A copy of the Commission's decision is attached as an appendix to this brief.

[12] In *Victoria Terminal*, the Commission clarified that *Pennsylvania R.R.* does not apply to motor carrier cases because the ICC's jurisdiction over rail and motor transportation is not coextensive. As the Commission explained (App.,

license and regulate any motor carriage that is part of interstate commerce, even if the Commission does not regulate the transportation at the moment it crosses state lines. The Commission's revised interpretation is currently under review in the court of appeals for the Fifth Circuit. *Steere Tank Lines Inc.* v. *ICC*, No. 89-4114.[13] In view of these circumstances, the instant case does not present an appropriate occasion for this Court to consider the Commission's revised interpretation.

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infra, 3a), the distinction in *Pennsylvania R.R.* between "transportation" and "commerce" is necessary in the rail area, but is not pertinent in the motor area. The Commission pointed to important differences in the governing statutes (App., *infra*, 3a), and to precedents acknowledging ICC jurisdiction over motor carriage movements within a single state when goods arrive by ship from a foreign country. *Id.* at 4a.

[13] The Commission's opinion in *Victoria Terminal* was served on the same day that the court of appeals' panel opinion was issued (Feb. 3, 1989). In opposing petitioners' unsuccessful petition for rehearing in the court of appeals, the Commission defended the revised policy on the merits. C.A. Opp. to Reh'g 8-10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

APPENDIX

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-C-30002

VICTORIA TERMINAL ENTERPRISES, INC.—
TRANSPORATION OF FERTILIZER WITHIN TEXAS—
PETITION FOR DECLARATORY ORDER

Decided: January 27, 1989

[Served Feb. 3, 1989]

Pursuant to 49 U.S.C. 10322(g)(1), we reopened this proceeding for the limited purpose of reconsidering that portion of our prior decisions relating to our jurisdiction over the ex-water motor movements involved in this case.[1]

In our prior decisions (served December 15, 1987 and April 29, 1988), we accepted (without analysis) the opponents' assertion that the Commission lacks jurisdiction over the single-State motor carrier movements that involve traffic having a prior bulk barge movement from an out-of-State origin. We then concluded that, even though the Commission lacks regulatory jurisdiction over such movements, it has the responsibility and expertise to determine whether those single-State movements constitute part of a

[1] On January 18, 1989, the United States Court of Appeals for the Fifth Circuit granted our motion for voluntary remand in Nos. 88-4001 and 88-4379, *Steere Tank Lines, Inc. v. Interstate Commerce Commission and United States of America*, to permit us to reconsider this issue.

continuing interstate transportation movement and hence are beyond the (intrastate) regulatory purview of the States.

The proposition that the ex-barge movements are not subject to Commission regulation was based in large part on a review board decision in *Behnken Truck Service, Inc., Ext.—Exbarge Traffic*, 103 M.C.C. 787 (1967). *Behnken*, in turn, was based upon a decision of the Supreme Court in *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). In *Pennsylvania*, the Court held that a single-State movement by rail was not part of interstate transportation (and thus could be regulated by the State) because the preceding movement into the State by private carriage was not "transportation" within the meaning of the Interstate Commerce Act.

In *Behnken* (and several earlier decisions), the *Pennsylvania* rationale was applied in determining that the Commission lacked jurisdiction over a single-State motor carrier movement of goods that had entered the State by an exempt move. The board felt constrained to this conclusion because:

> The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation. . . .

Behnken, supra, 103 M.C.C. at 796, citing *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964).

Upon closer analysis, we believe the review board erred in the *Behnken* line of cases in applying the holding of *Pennsylvania*, regarding the extent of the

ICC's *rail* jurisdiction, to a determination of its *motor* jurisdiction. This conclusion is based on the original (pre-recodification) language of the Interstate Commerce Act setting forth the Commission's jurisdiction over these modes.[2]

In the *rail* area, the original Interstate Commerce Act conferred upon the ICC jurisdiction over the transportation by railroad (as pertinent here) "from one State . . . to any other State" (section 1(1)), but not rail transportation that is conducted "wholly within one State" (section 1(2)(a)).

By contrast, in the *motor* area, Congress granted the Commission jurisdiction over transportation "in interstate and foreign commerce" (section 202(a)) and reserved to the States the power to regulate "intrastate commerce by motor carriers on the highways thereof" (section 202(b)(1)). It defined "interstate commerce" as "commerce between any place in a State and any place in another State . . . whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water" (section 203(10)).

Thus, the distinction made in the *Pennsylvania* case between "transportation" and "commerce" is necessary in the rail area, but not in the motor area. The statute does not preclude the Commission from licensing and regulating *motor* carriage that is conducted in interstate commerce, even if it does not

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[2] By Act of October 17, 1978, Pub. L. 95-473, 92 Stat. 1466, the Interstate Commerce Act was recodified. Section 3(a) provides that the recodification "may not be construed as making a substantive change in the laws repealed." *Atchison, T. & S.F. Ry. Co. v. United States*, 617 F.2d 485, 490 (7th Cir. 1980), *Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979).

regulate the transportation at the moment it crosses State lines.

Moreover, logically the fact that the ICC does not regulate the water portion of the movement ought not to be a critical determinant of its jurisdiction over the motor portion. If the fertilizer in this case had come into Texas by ship from a foreign country, the Commission would not regulate its mode of entry. Yet in that situation it is well settled that the Commission could regulate the subsequent movement by motor carriage within a single State (so long as the continuity of movement is not broken). See, for example, *Long Beach Banana Dist. v. Atchison, T. & S.F. Ry. Co.*, 407 F.2d 1173 (9th Cir. 1969), *cert. denied* 396 U.S. 819; *North Carolina Utilities Commission v. United States*, 253 F. Supp. 930 (E.D.N.C. 1966) (3-judge court).

In sum, we believe that whether a particular motor movement is considered to be interstate or intrastate should not depend upon how the fertilizer being moved by truck within Texas happened to cross the State line.[3] Therefore, we expressly overrule the review board decision in *Behnken*.[4]

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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[3] Compare, *ICC v. Texas*, —— U.S. ——, 107 S.Ct. 787, 793 (1987) (ICC to determine the proper interrelationship of different modes of transportation and to impartially regulate competing modes).

[4] To the extent that the *Behnken* analysis might appear to have been reaffirmed in Ex Parte No. MC-182, *United States Department of Transportation—Petition for Rulemaking—Single State Transportation in Interstate or Foreign Commerce* (not printed) (January 28, 1987), and other cases, we disavow the statements made in those cases on this point.

It is ordered:

1. Our prior decisions in this case are modified to the extent set forth above.

2. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

NORETA R. MCGEE
Secretary

[SEAL]

VICE CHAIRMAN SIMMONS, dissenting:

I believe that the approach taken by the majority in overturning the *Behnken* precedent is arbitrary and capricious. The decision overturns *Behnken* without comment or notice. Furthermore, the majority's justification for doing so is unpersuasive. *Behnken* correctly relied on *Penn R. Co.* v. *Public Utilities Commission of Ohio*, 298 U.S. 170 (1936). There the Supreme Court established the proposition that when transportation within a single state has been preceded by out-of-state barge movements, commerce for ICC purposes does not actually begin until placed in the possession of a carrier subject to regulation by us. The contention that the *Pennsylvania* principle is triggered only when rail movements are involved has no basis in law. The principle applies equally to motor carrier movements preceded by out of state barge movements. Nor has Congress ever made such distinction either directly or by inference. Moreover, Congress had the opportunity to make its intentions clear and overrule *Behnken* with the pas-

sage of the 1980 Carrier Act. As the Supreme Court observed: "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be". 298 U.S. 177.

COMMISSIONER LAMBOLEY, dissenting:

I do not agree with this attempt by the majority to bolster its original decision's jurisdictional basis. Additionally, and more fundamentally, I reaffirm my dissent to the ultimate holding of this case as stated in my dissenting separate expression to the decision served December 15, 1987.

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